REPORTS OF CASES

ARGUED AND DETERMINED

IN

e Court of King's Bench,

DURI ; ;

MICHAELMAS AND HILARY TERMS,

IN

THE FIFTH AND SIXTH GEO. IV.

BY

MES DOWLING, Esq. of the Middle Temple,

AND

ARCHER RYLAND, Esq. of Gray's Inn,

BARRISTERS AT LAW

VOL. V.

WITH AN INDEX,

AND

TABLE OF PRINCIPAL MATTERS.

LONDON:

EET, 3, CHANCERY LANE; R. PHENEY, INNER TEMPLE LANE;

A. MAXWELL, 21, STEVENS AND SONS, 39, BELL YARD;

Law Booksellers and Publishers:

AND R. MILLIKEN, GRAFTON STREET, DUBLIN.

1825.

London: Printed by C. Roworth
Bell-Yard, Temple-Bar.

JUDGES

OF THE

COURT OF KING'S BENCH,

During the Period comprised in this Volume.

Sir Charles Abbott, Knt. C. J.
Sir John Bayley, Knt.
Sir George Sowley Holroyd, Knt.
Sir Joseph Littledale, Knt.

Sir John Singleton Copley, Knt. Attorney-General.
Sir Charles Wetherell, Knt. Solicitor-General.

A

TABLE

OF THE

CASES REPORTED

IN THE FIFTH VOLUME.

*** The Case printed in *Italics* is from *MS*. Notes.

A.

	Page
ABBOTT, Walmsley *v.*	62
Alban's St. Rex *v.*	538
Ambrose, Ewer *v.*	629
Anderson, Hodgson *v.*	735
Anderton, Lang *v.*	393
Archbold, Harvey *v.*	500
Atkinson *v.* Cotesworth	552

B.

Bagot, Lord, *v.* Williams	87, 719
Barford *v.* Stuckey	118
Baron, Montague *v.*	532
Bartlett *v.* Downes	526
Basten *v.* Carew	558
Bentall *v.* Burn	284
Bewes, Buckle *v.*	495
Bint, Davies *v*	353
Bircham, Withers *v.*	106
Bishop *v.* Crawshay	279
——— Pidcock *v.*	505
Bloxsome *v.* Williams	82
Brown, Drant *v.*	582
Bryant Warne, *v.*	301
Buchanan, Plunkett *v.*	625
Buckle *v.* Bewes	495
Burn, Bentall *v.*	284
Bury, Petrie *v.*	152
Bushby *v.* Dixon	126

C.

	Page
Cadman *v.* Lubbock	289
Carew, Basten *v.*	558
Cave *v.* Massey	624
Chadley, Cuxon *v.*	417
Chatfield *v.* Ruston	675
Christchurch, York, Rex *v.*	314
Cooke, Rayer *v.*	302
Cotesworth, Atkinson *v.*	552
Cox, Sheldon *v.*	277
Crawshay, Bishop *v.*	279
Crosby, Nockells *v.*	751
Cross, Lyttleton *v.*	165
Cubitt, Gill *v.*	324
Curtis *v.* Godley Hundred	73
Cuxon *v.* Chadley	417

D.

Dalgleish *v.* Davidson	6
Davidson, Dalgleish *v.*	6
Davies *v.* Bint	353
Davies, Fleming *v.*	371
Deeble, Keene *v.*	383
Dixon, Busby *v.*	126
——— Palmer *v.*	623
Dobell *v.* Stevens	490
Doe *v.* Hulse	650
——— *v.* Lynes	160
——— *v.* Shawcross	711
——— *v.* Wilkinson	273

	Page
Downes, Bartlett *v.*	526
Drant *v.* Brown	582
Duffield *v.* Elwes	764
Duncan *v.* Thwaites	447
Dyson *v.* Wood	295

E.

Eades, Patteson *v.*	445
Eames, Mayhew *v.*	484
East India Company *v.* Tritton	214
Edwards, Wilson *v.*	622
Egan v. *Waterman*	326
Elliott, Laidler *v.*	635
Elsam, In re	389
Elwes, Duffield *v.*	764
Esdaile *v.* Oxenham	49
Ewer *v.* Ambrose	629
Ex parte Grocot	610

F.

Facey *v.* Hurdom	68
Falmouth, Earl of, *v.* Richardson	664
Fisk, Guthrie *v.*	24
Fleming *v.* Davies	371
Fletcher *v.* Pogson	1
Ford *v.* Primrose	287
Fowey, Mayor of, Rex *v.*	614

G.

Gabay *v.* Lloyd	641
Garrett *v.* Handley	319
Gill *v.* Cubitt	324
Gillard, Sawtell *v.*	620
Godley Hundred, Curtis *v.*	73
Goring, Weatherby *v.*	441
Grocot, Ex parte	610
Guthrie *v.* Fisk	24

H.

Hamerton *v.* Stead	206
Handley, Garrett *v.*	319
Harvey *v.* Archbold	500
Hawkins *v.* Warre	512
Hereford, Dean of, *v.* Macknamara	95
Hodgson *v.* Anderson	735
Holmes *v.* Love	56
Hull Dock Company, Rex *v.*	359
Hulse, Doe *v.*	650
Hunter, Storer *v.*	240
Huntingdonshire, Rex *v.*	588
Hurdom, Facey *v.*	68

I.

Iggulden, Wells *v.*	13
In re Elsam	389
Inwood *v.* Mawley	350
Ireson *v.* Pearman	687

J.

Jackson, Skaife *v.*	290
Jones, Rogers *v.*	268. 484
—— *v.* Williams	654
Johnston, Wilkinson *v.*	403
Josephs *v.* Pebrer	542

K.

Keene *v.* Deeble	583
Kemsett *v.* West	626

L.

Laidler *v.* Elliott	635
Lampeter, Rex *v.*	310
Lang *v.* Anderton	393
Lee, Lewis *v.*	98
Lewis *v.* Lee	98
Lincolnshire, Justices of, Rex *v.*	347
Lloyd, Gabay *v.*	641
Love, Holmes *v.*	56
Lubbock, Cadman *v.*	289
Lutterworth, Rex *v.*	343
Lynes, Doe *v.*	160
Lyon, Rex *v.*	497
Lyttleton *v.* Cross	165

M.

Macknamara, Hereford, Dean of, *v.*	95

	Page
Mahony, Martin *v.*	609
Manuel, Philpot *v.*	615
Martin *v.* Mahony	609
Massey, Cave *v.*	624
Mawley, Inwood *v.*	350
Mayfield *v.* Wadsley	224
Mayhew *v.* Eames	484
Maynard *v.* Rhodes	266
Maxfield, Todd *v.*	258
M'Gowran, Pearson *v.*	616
Miller, Young *v.*	263
Montague *v.* Baron	582
Moore *v.* Rawson	234
Morley *v.* Newman	317
Morris *v.* Robinson	34
Moxsey, Schlenker *v.*	747
N.	
Neale *v.* Wyllie	442
Newman, Morley *v.*	317
Nockells *v.* Crosby	751
Norman, Poucher *v.*	648
O.	
Oxenham, Esdaile *v.*	49
P.	
Palmer *v.* Dixon	623
Parker *v.* Ramsbottom	138
Patteson *v.* Eades	445
Pearman, Ireson *v.*	687
Pearson *v.* M'Gowran	616
Pebrer, Josephs *v.*	542
Petrie *v.* Bury	152
Philpot *v.* Manuel	615
Pidcock *v.* Bishop	505
Plunkett *v.* Buchanan	625
Pogson, Fletcher *v.*	1
Poucher *v.* Norman	648
Price *v.* Varney	612
Primrose, Ford *v.*	287
Q.	
Quieroz *v.* Trueman	192
R.	
Ramsbottom, Parker *v.*	138
Rawson, Moore *v.*	234
Rayer *v.* Cooke	302
Read, Stonehouse *v.*	603
Rex *v.* Christ Church, York	314
—— *v.* Fowey, Mayor of	614
—— *v.* Hull Dock Company	359
—— *v.* Huntingdonshire, Justices of	588
—— *v.* Lampeter, Inhabitants of	310
—— *v.* Lincolnshire, Justices of	347
—— *v.* Lutterworth	343
—— *v.* Lyon	497
—— *v.* St. Albans, Justices of	538
—— *v.* Saunders	611
—— *v.* Soper	669
—— *v.* Surrey, Justices of	308
—— *v.* Taylor	422. 521
—— *v.* Totness, Mayor of	481
—— *v.* Tremaine	413
—— *v.* Tucker	434
—— *v.* Warnford	489
—— *v.* West Looe	414. 590
—— *v.* Wigston, Great	339
—— *v.* Wilson	602
Rhodes, Maynard *v.*	266
Richardson, Falmouth, Earl of, *v.*	664
Robinson, Morris *v.*	34
—————— Spenceley *v.*	572
Rogers *v.* Jones	268. 484
Ruston, Chatfield *v.*	675
S.	
Saunders, Rex *v.*	611
Sawtell *v.* Gillard	620
Schlenker *v.* Moxsey	747
Shawcross, Doe *v.*	711
Sheldon *v.* Cox	277
Skaife *v.* Jackson	290
Soper, Rex *v.*	669
Spenceley *v.* Robinson	572
St. Alban's, Rex *v.*	538
Stead, Hamerton *v.*	206
Stephens *v.* Weston	399

TABLE OF CASES REPORTED.

	Page
Stevens, Dobell *v.*	490
Stonehouse *v.* Read	603
Storer *v.* Hunter	240
Stuckey, Barford *v.*	118
Surrey, Justices of, Rex *v.*	308
Sykes *v.* Sykes	292
T.	
Taylor, Rex *v.*	422. 521
Thomas *v.* Thomas	700
——— Tripp *v.*	276
Thwaites, Duncan *v.*	447
Todd *v.* Maxfield	258
Totness, Mayor of, Rex *v.*	481
Tremaine, Rex *v.*	413
Tripp *v.* Thomas	276
Tritton, East India Company *v.*	214
Trueman, Quieroz, *v.*	192
Tucker, Rex *v.*	434
Twopeny *v.* Young	259
V.	
Van Wart *v.* Woolley	374
Varney, Price *v.*	612
W.	
Wadsley, Mayfield *v.*	224
Walmsley *v.* Abbott	62
Warne *v.* Bryant	301
Warnford, Rex *v.*	489
Warre, Hawkins *v.*	512
Waterman, Egan v.	326
Weatherby *v.* Goring	441
Wells *v.* Iggulden	13
West, Kemsett *v.*	626
—— Looe, Rex *v.*	414. 590
Weston, Stephens *v.*	399
White *v.* Wright	110
Wigston, Great, Rex *v.*	339
Wilkinson, Doe *v.*	273
Wilkinson *v.* Johnston	403
Williams, Bagot, Lord, *v.*	87. 719
——— Bloxsome *v.*	82
——— Jones *v.*	654
Wilson *v.* Edwards	622
—— Rex *v.*	602
Withers *v.* Bircham	106
Wood, Dyson *v.*	295
Woolley, Van Wart *v.*	374
Wright, White *v.*	110
Wyllie, Neale *v.*	442
Y.	
Young *v.* Miller	263
——— *v.* Twopeny	259

CASES

ARGUED AND DETERMINED



IN THE

COURT OF KING'S BENCH

IN

MICHAELMAS TERM,

IN THE FIFTH YEAR OF THE REIGN OF GEORGE IV.

FLETCHER and others, Assignees of ROBERT SIMPSON, a bankrupt *v.* T. POGSON and G. THOMAS, Bail of HENRY FREEMAN YOUNG POGSON and CHARLOTTE ISABELLA, his wife. (*a*)

In proceedings by scire facias against bail, the declaration stated that " *S.* the plaintiff in the original action became bankrupt " whereupon a commission of bankrupt was duly awarded against him; and *A. B.* and *C.* (plaintiffs in the sci. fa.) were *duly chosen assignees* of the estate and effects of the said *S.* under the commission, and now on behalf of the said *A B.* and *C. as assignees as aforesaid*, we have been informed," &c. :—Held, that this was a sufficient averment of the plaintiffs' title to sue as assignees, without alleging that an assignment of the bankrupt's effects had been actually made; but upon special demurrer, it seems that it would have been bad for uncertainty.

SCIRE facias against bail. The declaration recited a recognizance entered into by defendants as bail in an action brought by *Robert Simpson*, the bankrupt, against *Pogson* and wife; and a judgment for the plaintiff in that action, which still remained unsatisfied, and then proceeded thus: " And whereas the said *Robert Simpson* afterwards became bankrupt, within the true intent and meaning of the several statutes made and then in force concerning bankrupts, some or one of them; whereupon a certain commission of bankrupt, under the great seal of the united kingdom of *Great*

(*a*) Pursuant to the king's warrant issued in *Trinity* Term, by virtue of the statute 3 *G.* 4. c. 102, three of the Judges of this Court sat at the *Guildhall*, *Westminster*, from the 8th until 17th *July*, inclusively, and on the 25th *October* all the Judges sat and continued sitting until the first day in this term.

1824

FLETCHER *v.* POGSON.

Britain and *Ireland*, was duly awarded and issued against the said *Robert Simpson*, and now on behalf of the said *E. F. R. B.* and *J. T.*, *as assignees as aforesaid*, in our said Court before us, we have been informed, &c." The declaration, after stating, that two writs of scire facias had been sued out against the bail, the returns to which were set out, concluded as follows: "And thereupon the said *G. F. R. B.* and *J. T.*, *assignees as aforesaid*, pray that execution may be adjudged to them against the said *T. Pogson* and *G. Thomas*, of the damages aforesaid, according to the form and effect of the said recognizance." The defendants pleaded that there was no ca. sa. duly issued against the said *H. F. Y. Pogson* and his wife, upon the said judgment, and duly returned. The plaintiffs replied by setting out a ca. sa. and return thereto. Demurrer to the replication and joinder in demurrer.

Abraham in support of the demurrer. The plaintiffs have not by their declaration shewn any title to sue as assignees. In the first place they do not shew when the commission issued, and in the second, they have not shewn that there had ever been any assignment to them of the bankrupt's estate, and consequently they have no right to sue as assignees. Being chosen as assignees, without a valid assignment by the commissioners, is insufficient to support their title.

Curwood, contrà. The declaration avers that the plaintiffs were *duly chosen* assignees of the estate and effects of the bankrupt, and therefore the Court may intend not only that they were duly chosen, but that a valid assignment was made to them pursuant to the 5 *Geo.* 2. c. 30. s. 26. The statute directs that the commissioners shall assign the bankrupt's estate and effects to the assignees when they are chosen. It must be presumed, therefore, that the commissioners have performed their duty. [*Bayley*, J. If the declaration had averred that "they became and were as-

1824.

FLETCHER v. POGSON.

signees," that would have done. The difficulty here is, that the plaintiffs have not sufficiently shewn that they were assignees. It may be true that they were duly chosen, but non constat that there was any assignment made to them. There is no averment of any assignment having been made. *Littledale*, J. If the precedent in *Winter* v. *Kretchman* (*a*), had been followed, it would have done. There the averment was, that the effects of the bankrupt were, after he became a bankrupt, " in due manner assigned to the plaintiffs according to the form of the statute in that case made and provided." *Holroyd*, J. Here the declaration merely states, that the plaintiffs were duly chosen assignees, and speaks of them " as assignees as aforesaid." That means nothing more than that they were assignees by choice; but it does not import that there was any valid assignment.] This declaration follows the form given by Mr. *Tidd* in his Appendix (*b*), which is a book of authority, and the forms there given are in general use.

BAYLEY, J.—The form adopted in this particular case follows the form given, in certainly the very best book of forms ever yet published, and which is a work of general resort. It follows exactly that form, with the single exception of the word " as". The words in Mr. *Tidd's* form are, " and *G. F.* was duly chosen assignee of the estate and effects of the said *A. B.* under the said commission: and now on the behalf of the said *G. F.* assignee as aforesaid, in our said Court before us, we have been informed." &c. Here the word " *as*" is introduced before the words " *assignees as aforesaid;*" but I think that makes no substantial difference, because it does not vary the sense. In this case, as well as in that, the parties are described as " assignees as aforesaid," and that being the form in general use, as s. 26 of 5 *Geo.* 2. c. 30. directs that the commissioners *shall* assign the bankrupt's estate and effects to the

(*a*) 2 T. R. 45. (*b*) P. 548.

1824.

FLETCHER v. POGSON.

persons who are chosen assignees, I think, looking at the whole of these pleadings, we are at liberty to consider these plaintiffs not only as being duly selected as assignees by the choice of the other creditors, but as having duly become assignees, by a valid assignment of the bankrupt's estate and effects. It is averred that the plaintiffs were duly chosen assignees of the estate and effects of the bankrupt, and then they are described as "assignees as aforesaid." I think that those words "as assignees as aforesaid," do not merely mean persons who had been chosen assignees, but persons who *were* assignees; and that construction is very strongly confirmed by the manner in which they are afterwards spoken of in the conclusion of the declaration: "And thereupon the said *E. F. R. B.* and *J. T.*, *assignees as aforesaid*, pray," &c.; thus describing them as assignees, with words of reference, and the word "aforesaid" may mean to describe them as assignees of the estate and effects. The effect of a contrary reading would be to overturn almost every scire facias brought during a great number of years; and we ought to adopt that rule of construction which will support the declaration.

HOLROYD, J.—If this declaration had been demurred to, and it appeared that there was no authority for suing out the scire facias, I think it would be insufficient, and we could not give judgment for the assignees. But the defendants not having demurred, (as I think they might, for the uncertainty of the averment now objected to,) a well known rule of law comes into operation, namely, that that which is stated to admit of two constructions, and the party objecting does not demur to it, such a construction should be given to the declaration, as will uphold, and not destroy it. It is stated here that *Simpson* became bankrupt, "whereupon a certain commission of bankrupt was duly awarded and issued against him, and that the plaintiffs were duly chosen assignees of the estate and effects of the said *Simpson*, under the said commission." Then it goes on

to say, "and now on behalf of the said *F. B.* and *T. as assignees as aforesaid*," &c. If we read that "as assignees of the estate and effects," the allegation before, that they were duly chosen under the said commission, would support the scire facias. If we leave out the words of relation, and place the words "as assignees," with the words "of the estate and effects," that would be sufficient, because then they might be read "now on behalf of *J. F.* &c. as assignees of the estate and effects of the said *R. S.* under the said commission," and the scire facias would be good, because there need then be no allegation that any persons were chosen assignees. If, however, the allegation "now on behalf of the said *F.* &c., as assignees as aforesaid," is to be taken as meaning that the plaintiffs were only chosen assignees as aforesaid; then I think it would not be sufficient. The question, however, is, whether we can adopt that rule of construction in an equivocal case, which will support and not destroy the proceeding. I think we are justified in adopting such a construction as will give validity to it; and in doing so, we may bring in aid, the usuage in such cases. Undoubtedly the adoption of a form from a printed book, though certainly of the highest reputation for accuracy, would be by no means conclusive; because it would only go to shew what the opinion of the profession may have been as to such forms. Then the declaration goes on in conclusion, "and thereupon the said *E. F.* &c., *assignees as aforesaid, &c.*" Now there having been no demurrer on the part of the defendants for the uncertainty of these averments, I think we may adopt the rule of construction already adverted to, and hold this declaration to be sufficient.

LITTLEDALE, J.—The defendants, by pleading that no ca. sa. had issued, admit that the plaintiffs are in a capacity to sue as assignees; but still, if it clearly appeared that the plaintiffs had no title, I think the defendants would not be concluded by their plea. Had the declaration been de-

1824.

FLETCHER v. POGSON.

murred to specially, I am inclined to think it would have been insufficient for uncertainty, in not shewing the plaintiffs' title to sue as assignees. They have no title, merely because they are chosen assignees, unless the choice is followed by an actual assignment. Chusing assignees may for some purposes be considered as completely investing them with the character of assignees. In practice, the form given in *Tidd* is, I believe, in general use; and I observe, that in Mr. Serjeant *William's* edition of *Saunders's* Reports (*a*), he enters into a long discussion respecting proceedings in scire facias, and refers to the form in *Tidd's* Practical Forms. So that Mr. Serjeant *Williams* considers that as a book of authority. In the same note, he refers to *Hewit* v. *Mantell* (*b*), which seems to go the length of shewing that this declaration is sufficient. On the whole, I think that this scire facias may be supported; for though the declaration only describes the plaintiffs as assignees of the estate, yet we may presume that an assignment was duly made, in pursuance of the statute.

Judgment for the plaintiffs (*c*).

(*a*) 2 Saund. 72, 1. (*b*) 2 Wils. 372.

(*c*) See *Kinnear* v. *Tarrant*, 15 East. 622. *Waugh* v. *Austen*, 3 T. R. 437.

DALGLISH and others *v.* DAVIDSON.

The owner of a *British* ship may avail himself of a statement of average made at the port of delivery in a foreign country, according to the law thereof, so as to charge a *British* freighter of goods, under a charter made in *Britain*, with the expenses of *wages and provisions for the seamen*, incurred during the necessary detention of the ship at an intermediate port, although by the law of this country such expenses would not be recoverable as average.

ASSUMPSIT to recover 116*l.* 15*s.* 6*d.*, money received by the defendant to the plaintiff's use. At the trial before *Abbott*, C. J. at the *London* adjourned sittings after *Trinity* Term, 1823, a verdict was found for the plaintiffs, subject to the opinion of the Court upon a case, which stated the following facts:—

The defendant was owner of the ship *Brothers*, registered in the port of *Grangemouth* in *Scotland*, where he resided at the time of making the agreement and of signing the bills of lading after mentioned. The plaintiffs, who resided at *Glasgow*, agreed for the hire or freight of the said ship from *Greenock* to *St. Petersburgh*, at a certain rate of freight and other charges, stipulated in the following letter, addressed to them by the defendant.

Grangemouth, 16*th September*, 1820.

Messrs. *R. Dalglish, Falconer* and Co., *Glasgow*.

Gentlemen.—I hereby offer you the brig *Brothers*, of which vessel I am master, to proceed on *Monday*, first to *Port Glasgow* and *Greenock*, and there load a cargo of sugars, and such goods as you may have to ship for *St. Petersburgh*, and to carry about seventy-five tons through the canal, and load up the remainder here for the sum of two hundred and fifty pounds sterling, *in full of canal dues and all other charges*; the cargo to be discharged at *Cronstadt*, but, should I find that the frost is not set in there on arrival, and that I can proceed to *St. Petersburgh*, I am to have thirty pounds more for carrying to *St. Petersburgh* all that the vessel can take upon the draught of water, and the remainder to go up from *Cronstadt*, at your expense; to have eighty pounds to account of the freight, to pay charges at *Greenock* and through the canal; to be loaded immediately, and discharged at *Cronstadt* or *St. Petersburgh*, as soon as possible after arrival. And this offer binding, having your acceptance this evening. I am, &c.

The ship took in a cargo at *Greenock*, the greater part of which, consisting of sugars and cotton goods, was shipped by plaintiffs, and consigned to their agents at *St. Petersburgh*. Two bills of lading were signed by the Captain in the following form:

Shipped in good order and well conditioned by *R. Dal-*

1824. DALGLISH v. DAVIDSON.

glish, Falconer and *Co.* in and upon the good ship or vessel called *The Brothers,* whereof is master for this present voyage *John Davidson,* and now lying in the harbour of *Greenock,* bound for *Cronstadt* or *St. Petersburgh,* to say, three hundred and fifty-five boxes of sugars, weighing gross, sixty eight tons, seventeen hundred weight, three quarters, and fifteen pounds, being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned at the aforesaid port of *Cronstradt* or *St. Petersburgh* (the act of God, the king's enemies, and all and every other dangers and accidents of the seas, rivers and navigation, of what nature or kind soever, excepted) unto *Allan, Stewart,* and *Co.,* or to their assigns, he or they paying freight for the said goods, sixty shillings *British* sterling per ton, as per agreement, with primage and average accustomed. In witness whereof, the master or purser of the said ship, or vessel, hath affirmed to four bills of lading, all of this tenor and date, the one of which four bills, being accomplished, the other three to stand void, &c. Dated at *Greenock.*

28 *September,* 1820. *John Davidson.*

Some other goods, were, with plaintiff's consent, shipped by two other persons respectively, on board *The Brothers,* consigned to different merchants residing at *St. Petersburgh,* and bills of lading, similar to the bills of lading for the plaintiff's goods, were duly signed by the Captain. On the 4th *October,* 1820, the vessel sailed from *Greenock* with the said cargo, for *St. Petersburgh,* and having encountered very tempestuous weather, she was necessarily obliged to put into *Erdholm,* in *Denmark,* for the preservation of the ship and cargo. It was necessary to unload the cargo, and fifty-two chests of sugar, belonging to the plaintiffs, being found damaged by salt water, were properly sold there to prevent further loss, and produced the sum of 280*l.* 9*s.* 4*d.* sterling; which sum was expended at *Erdholm* in and about the necessary repairs and refitting of the ship. The

ship proceeded on her voyage, and having arrived at *St. Petersburgh*, the cargo was landed into the government warehouses, which are the usual places for such goods. By the law of *Russia*, officers called dispatcheurs, are appointed to make up and settle general and particular averages, who have cognizance and authority in all matters relative thereto; and by the same laws, no part of the cargo which is the subject of such average, or liable to contribute thereto, is allowed to be taken out of the government warehouses, until the proportionable contribution to such average, according to the statement or settlement of the dispatcheur, be paid in respect of such goods, or security be given for the payment thereof. The defendant, upon his arrival at *St. Petersburgh*, accordingly put his papers relative to the general and particular average, which had been incurred in the course of the voyage, into the hands of Mr. *J. Heimberger*, one of the dispatcheurs legally appointed and acting as aforesaid, at *St. Petersburgh*; and and Mr. *Heimberger* called upon Messrs. *Allan*, *Stewart*, and *Co.*, and also upon the several consignees of the other parts of the cargo, for their invoices of the said cargo, and such other documents as were by him deemed necessary for the proper ascertainment and settlement of the said averages; and invoices, and other documents were accordingly furnished to the dispatcheur, by Messrs. *Stewart* and *Co.*, and the other consignees respectively. Mr. *Heimberger* thereupon made up and duly signed his statement and settlement of the general and particular average incurred in the course of the voyage, and in conformity thereto, delivered to Messrs. *Stewart* and *Co.*, and also to the defendant, separate accounts current, relative to the said average; in which accounts the proceeds of the fifty-two chests of sugar sold at *Erdholm* by the defendant were included and carried to the credit of Messrs. *Stewart* and *Co.* The latter paid the dispatcheur 368 roubles, 33, the balance of their account. The consignees of the other parts of the cargo respectively paid to the dispatcheur

1824.
DALGLISH v. DAVIDSON.

1824.

DALGLISH v. DAVIDSON.

the several sums of 522 roubles and 417 roubles, as their respective proportions of the contribution to the said general average in respect of the goods so consigned to them respectively; and Messrs. *Liddell* and *Co.*, the agents for the defendant, received from the dispatcheur the sum of 291 roubles, the balance of defendant's account current. The cargo of the ship, except the fifty-two chests of sugar before mentioned, was delivered to the respective consignees thereof, agreeably to the bills of lading for the same. The balance of freight for the voyage, after giving credit for previous advances, and for the freight received from the other consignees, was paid by Messrs. *Stewart* and *Co.* to the defendant at *St. Petersburgh*. By the laws and customs of *Russia*, the wages and provisions of the crew of a vessel driven into and detained in port, under the circumstances hereinbefore stated, as affecting *The Brothers* during such detention, are considered as general average charges, and in the statement or settlement of average made up by Mr. *Heimberger*, a sum of 3981 roubles is accordingly included and allowed for the wages and provisions of the Captain and crew of *The Brothers*, while she was so necessarily detained at *Erdholm*, of which sum the proportion for the goods belonging to the plaintiffs, amounted to 116*l*. 15*s*. 6*d*. The plaintiffs had insured the said goods by a policy in the common printed form at *Lloyd's* Coffee House, and the underwriters have refused to pay the plaintiffs any part of the said 116*l*. 15*s*. 6*d*., on the ground, that it is the custom of *Lloyd's*, on making up average losses, not to allow as against the underwriters the wages and provisions of the crew whilst detained under similar circumstances as *The Brothers* was at *Erdholm*. The plaintiffs admit that they were liable to contribute the sum of 163*l*. 13*s*. 10*d*. towards the general average; but they contend that the before mentioned charges for wages and provisions ought not to have been included or allowed in the settlement of the said average; and they seek to recover in the present action the said sum of 116*l*. 15*s*. 6*d*., as the

1824.

DALGLISH v. DAVIDSON.

balance of the proceeds of the said fifty-two chests of sugar so sold as aforesaid, after allowing the said sum of 163*l*. 13*s*. 10*d*. thereout, but excluding any allowance for the wages or provisions.

The question for the opinion of the Court is whether the owner of a *British* ship can avail himself of a statement of average made in a foreign country, so as to charge shippers of goods or a freighter under an agreement for charter, entered into in this country, with the expenses of wages and provisions included in such statement of average, according to the practice of the foreign country where it was made.

Campbell for the plaintiffs. This case is distinguishable from *Simonds* v. *White* (a), which was decided last *Easter* Term, because here the whole transaction is *British*. It arises at a *British* port; both the owner of the vessel and the shippers of the goods are natives of *Britain*, and were living in this country at the time the adventure began, and therefore the parties must be considered as entering into a contract which was to be governed by *British* law, and consequently the plaintiffs have a right to recover back the expense of the seamen's wages and provisions, for which they would not have been liable by the maritime law of this kingdom. But assuming that, inasmuch as the ship's port of delivery was *St. Petersburgh*, the plaintiffs would be bound by a statement of average made up conformably to the law of *Russia*; still in this case, the defendant has, by the letter of the 16*th September*, 1820, precluded himself from making any claim upon the plaintiffs, beyond the sum therein stipulated as the freight to be paid for the whole voyage. That letter is in the nature of a charter party, and thereby the defendant lets the ship for a voyage from *Greenock* to *St. Petersburgh*, "for the sum of 250*l*. sterling, in full of

(a) Ante, vol. iv. 375.

1824.

DALGLISH v. DAVIDSON.

canal dues, *and all other charges.*" This therefore being a specific contract for the voyage, the defendant must be bound by it, and has no right to be paid any additional charges incidental to the voyage. [*Bayley*, J. Suppose anything were to happen in the course of the voyage, which, according to the laws of *Great Britain*, would entitle the owner of the ship, and render the freighter liable to general average, do you say that these words in the letter would have excluded the claim?] No, that is not contended. This contract would not exclude any thing that would be due to the defendant by the law of *Great Britain*. [*Bayley*, J. Then does not that admission bring this case clearly within *Simonds* v. *White*? Admitting that the defendant has by the contract alluded to, agreed to let the ship for the voyage, "for the sum of 250*l.* sterling, in full of canal dues and *all other charges*," still is not the law left open, upon the question of average, as much as if there were no specific contract between the parties?] In this case, part of the plaintiff's goods were sold at *Erdholm*, in *Denmark*, and at that time a debt became due from the defendant to the plaintiffs, for the proceeds of those goods. If the settlement of the amount had taken place between the parties at that time and place, there is no reason why the law of *Russia* should be called in aid to adjust the average. The law of *Denmark* would have then prevailed, if the plaintiffs were to be bound by the law of any foreign state under the circumstances of this case; but this being throughout a *British* transaction, the settlement of average could only take place according to the law of *England*. [*Bayley* J. All the plaintiff's goods were not sold at *Erdholm*?] No, not the whole. The defendant sold part of the goods in order to collect a sum of money necessary for the purpose of the ship's conveyance to *St. Petersburgh*; but on her arrival at that port, the plaintiffs would have been entitled to be reimbursed for that part of the cargo which was sold. The money for which it was sold must have been replaced to their account.

1824.

DALGLISH v. DAVIDSON.

BAYLEY, J.—But I am of opinion, that so much only could have been replaced to the plaintiff's account as the law of the country, a port of which was the ship's place of ultimate delivery, would warrant; and that brings this case precisely within the principle of *Simonds* v. *White*, from which I think it is not distinguishable.

HOLROYD, J. and LITTLEDALE, J., concurred.

A nonsuit was therefore directed to be entered.

Anderdon was to have argued the case for the defendant.

WELLS *v.* IGGULDEN.

Where a declaration in debt for penalties on the 55 *G.* 3. c. 137. s. 6. charged that defendant, being overseer of the parish of, C. in his own name supplied for his own profit certain goods and provisions for the support of the poor of the said parish, "whereby, and by force of the statute in such case made and provided, said defendant forfeited for his said offence 100*l.*, and thereby, and by force of the statute in such case made and provided, an action hath accrued, &c.:"—Held ill, for not averring in terms that the act done was "against the form of the statute," and after verdict the judgment was arrested.

In a declaration on the same statute, it is unnecessary to negative the exceptions in the 6th sect. which imposes the penalty.

DEBT on the statute 55 *Geo.* III. c. 137. s. 6. for penalties. The declaration contained three counts. The first count stated, that defendant was overseer of the poor of the parish of *Cranbrook*, in the county of *Kent*; and whilst he was such overseer, to wit on &c., at &c., did in his own name, provide, furnish and supply, for his own profit, certain goods and provisions for the support and maintenance of the poor of the said parish in the workhouse of the said parish; "whereby, and by force of the statute in such case made and provided, the said defendant forfeited for his said offence the sum of 100*l.*, and thereby and by force of the statute in such case made and provided, an action hath accrued, &c. The second count was similar to the first, omitting to state that the poor were in the workhouse; and the third count differed only from the others in describing the defendant as a person in whose hands the providing for, ordering, management, control, and direction

1824.

WELLS v. IGGULDEN

of the poor of the parish of *Cranbrook* was duly placed. Plea, the general issue. At the trial before *Alexander*, C. B., at the last *Lent* Assizes for the county of *Kent*, the plaintiff had a verdict for one penalty of 100*l.*

Gurney, in *Easter* Term last, obtained a rule nisi to arrest the judgment on two grounds, first, that the acts done by the defendant were not alleged in any one of the counts, to be against "the form of the statute," on which the declaration was framed, and he cited *Lee* v. *Clarke*; (*a*) and second, that the declaration did not negative the exceptions contained in the sixth section, by which the penalty is imposed. (*b*)

(*a*) 2 East, 332.

(*b*) The 6th section, after prohibiting persons having the management of the poor from being concerned in any contracts, &c., whilst in office, under the penalty of 100*l.* proceeds as follows: provided nevertheless that if it shall happen in any parish, &c., that a person or persons competent and willing to undertake the supply of any of the articles or things required for such workhouse or workhouses, or for the use of the poor there, cannot be found within a convenient distance therefrom other than and except some or one of the churchwardens and overseers of the poor, or other person or persons having the ordering, managing, &c., of the poor in such parish, &c., then and in every such case it shall and may be lawful to and for any two or more neighbouring justices of the peace, by certificate under their hands and seals, to permit and suffer any one or more of such churchwardens and overseers, or other such person or persons as aforesaid, to contract and agree for the furnishing and supplying of any articles or things which may be required for such workhouse or workhouses, or otherwise for the use of the poor of such parish, &c., during the time which he or they may retain such appointment, any thing herein contained to the contrary notwithstanding, &c.; and such certificate shall be entered with the clerk of the peace, &c., of the county, &c., in which such person or persons shall reside, and a copy thereof left with him, &c., and from that time every person and persons named in any such certificate shall be discharged from any penalty to which he or they would otherwise be liable under this act for furnishing or supplying any such articles or things as aforesaid; and in case any action or suit, for the recovery of any such penalty as aforesaid, shall be commenced against any person or persons to whom such certificate shall have been granted as aforesaid, it shall and may be lawful to and for such person or persons to plead generally that he or they was or were duly discharged from any liability to such for-

1824.

WELLS v. IGGULDEN.

Abraham shewed cause against the rule. Neither of these objections can prevail. As to the first, it is sufficient to shew that the offence alleged is committed contrary to the provisions of some statute, the act imputed to the defendant not being any offence at common law. Now the language of all the counts shews that this was a statutable offence, and committed against the statute. In all the counts the offence is first described, and each concludes with this averment, "whereby and by force of the statute in such case made and provided, the said defendant hath forfeited for his said offence the sum of 100*l*., and thereby and by force of the statute in such case made and provided, an action hath accrued to the plaintiff to have and demand of and from the defendant, the said sum of 100*l*." The omission of the words "against the form of the statute," does not vitiate any of the counts. In an action on a penal statute, it is not necessary to aver that it is *contrà formam statuti*; it is sufficient, if so much be stated as brings the case within some public statute. That is manifestly the case in this instance. In *Coundell* v. *John*, (*a*) it was laid down, that "where a statute introduces a new law, by giving an action where there was none before, or by giving a new action in an old case, the plaintiff need not conclude, contrà formam statuti;" but if a statute give the same action, with a difference of some circumstances, as double damages, &c., the plaintiff must either conclude contrà formam statuti, "or make his case so particularly within the statute, that it may appear to be so." In another report of the same case (*b*), Lord *Holt* is made to say, "If no action lies at the common law, and you may have an action by a general statute, then if you bring yourself within the description of such statute, you need not conclude contrà for-

feiture, by a certificate granted according to the provisions of this act; and upon due proof being given of such certificate, and of such entry thereof as aforesaid, the jury shall find a verdict for the defendant in such action or suit, &c.

(*a*) 2 Salk. 505. (*b*) Holt's Rep. 634. Fortes. 125.

1824.

WELLS v. IGGULDEN.

mam statuti." The case of *Lee* v. *Clarke*, which was relied upon in support of this objection, is not in point, because here the offence is created and the penalty imposed by the same statute; whereas there, the offence was against several statutes; and the declaration having concluded, "whereby and by force of the *statute* in that case made and provided, an action hath accrued," &c. the Court held the averment insufficient. That was an action upon the game laws, 5 *Ann.* c. 14., 9 *Ann.* c. 25., 8 *Geo.* 1. c. 19. and 2 *Geo.* 3. c. 19., and was in part founded upon all these statutes, and therefore the objection was well taken. But what is there reported to have been said by *Lawrence*, J. is important as affording an answer to the objection in this case, viz. "If it had said *statutes*, in the plural number, perhaps that might have done; but it certainly is not sufficient with reference only to the statute 2 *Geo.* 3. c. 19., because that alone would not support the action." The opinion of that learned Judge seems to have been, that if the same statute had created the offence and given the penalty, the averment in that case would have been sufficient. The case of *Earl Clanricarde* v. *Stokes* (*a*) is also an authority in favour of the plaintiff. In that case the offence was created by one statute, and the action given by another; and although it was averred, that the act was done "against the form of the *statute*, by reason whereof, and by force of the *statute* in such case made and provided, an action hath accrued," it was held that such an averment was sufficient. If the language of the declaration in the present case is sufficient to shew that the offence is within the statute, the pleader has done enough. This being an offence created by statute, it is conceded that it must be shewn to be within the statute; but if the language is equivalent or tantamount to the words "against the form of the statute," no more is requisite. There is no magic in these precise words; there is nothing peculiar in them. The averment in this decla-

(*a*) 7 East, 516.

1824.

WELLS v. IGGULDEN.

ration is equivalent to them, and that is sufficient. Then, as to the second objection, the case of *Jones* v. *Axen* (a) is a complete answer to it. The rule of pleading is, that if in an enacting clause creating the offence, any thing by way of exception is incorporated, then the pleader is to negative the exception by way of averment; but where the exception comes after by way of proviso, the pleader is not bound to take notice of it, but it more properly lies on the defendant to shew by his plea that he comes within the proviso. Here the offence is completely described in the first part of the 6th section; and then follows a proviso, within which the defendant is to bring himself if he can. Indeed the proviso expressly declares that "in case any action or suit for the recovery of any such penalty shall be commenced against any person to whom such certificate shall have been granted, it shall and may be lawful to and for such person to plead generally, that he was duly discharged from any liability to such forfeiture by a certificate granted according to the provisions of this act, and upon due proof being given of such certificate, the jury shall find a verdict for the defendant in such action or suit." It is clear, therefore, that the plaintiff was not bound to negative the exceptions in the statute, and that it lay upon the defendant to bring himself within the exception by way of defence.

Chitty (with whom was *Gurney*) contrà. It is essential to this record, that it should be distinctly averred in terms, that the offence described in the previous part of the declaration was "against the form of the statute." No periphrasis or intendment will supply the omission of these technical words. Any departure from this averment is an innovation on an established and inflexible rule of pleading upon penal statutes, which the Court will not countenance. The averment, "whereby and by force of the statute in such case made and provided, the said defendant forfeited for his

(a) 1 Lord Raym. 119; see 7 T. R. 31.

1824. WELLS v. IGGULDEN.

said offence the sum of 100*l.*, and thereby and by force of the statute in such case made and provided, an action hath accrued," &c. is a deduction without premises,—a conclusion without a sufficient allegation. The law requires that the offence itself should first be described in apt terms, so as to meet the specific offence prohibited by the statute; and then the declaration should conclude with an averment in terms, that the said offence so described is "against the form of the statute." In the elementary books on the crown law, (*a*) it is laid down that "if an indictment do not conclude *contrà formam statuti*, and the offence indicted be only prohibited by statute, and not by common law, it is wholly insufficient, and no judgment at all can be given upon it." The same principle applies to actions upon penal statutes, and no case can be found which establishes a contrary position. The dictum of *Lawrence*, J. in *Lee* v. *Clarke* is no decision upon the point, because that learned judge merely says, "if it had said *statutes* in the plural number, *perhaps* it might have done." The objection here is that the averment "whereby and by force of the statute," &c. is merely the special pleader's statement of a legal result, without premises whereon to found it. The facts stated as constituting the offence might have happened long before the passing of the act, and if this averment would be sufficient upon the plea of the general issue, all that would be necessary to prove would be, that the act was done as alleged. The omission therefore of the words "contrà formam statuti," is a fatal objection. Then, secondly, the declaration should have negatived the exceptions in the sixth section, for although the exceptions come by way of proviso, still the proviso forms part of the section, and the declaration should have taken notice of them.

BAYLEY, J.—That objection appears to me clearly not to be tenable. The general rule is, that if there is an excep-

(*a*) Hawk. P. C. lib. 2. c. 25. s. 116, 117. 8th ed. by *Curwood.*

1824.

WELLS v. IGGULDEN.

tion which constitutes an essential part of an enacting clause, the pleader must negative the exception in the declaration; but if the exception comes after the enacting clause by way of proviso, then it is sufficient for him to shew that the facts alleged are within the enacting part of the clause, and what is contained in the proviso must be stated by the other party, by way of plea or defence. In this case, it is clear that the exception comes in by way of proviso, and is not incorporated with the enacting part of the clause. In many acts of parliament parentheses are introduced by way of exception or qualification, and become inseparable from the enacting clause, and therefore the pleader is under the necessity of negativing such exception or qualification. For instance, in the game laws, it is enacted that if any person "not being qualified shall do so and so," those words clearly form part of the enacting clause. But here the exception comes in by way of proviso. The sixth section enacts, "that no churchwarden or overseer of the poor, or other person or persons in whose hands the collection of the rates for the relief of the poor or the providing for the poor of any parish or parishes, &c., shall or may be placed jointly with or independent of such churchwardens and overseers, or any of them, under or by virtue of any act or acts of parliament, shall, either in his own name or in the name of any other person or persons, provide, furnish, or supply, for his or their own profit, any goods, &c., for the use of any workhouse or workhouses, or otherwise, for the support and maintenance of the poor in any parish, &c., for which he or they shall be appointed as such, during the time which he or they shall retain such appointment, nor shall be concerned directly or indirectly in furnishing or supplying the same, or in any contract or contracts relating thereto, under pain of forfeiting the sum of one hundred pounds." There the sentence is entire and complete. Then comes a proviso, which is as distinct and substantive as if it was numbered as the seventh section. The manner in which the proviso hap-

1824. WELLS v. IGGULDEN.

pens to be printed does not vary the legal effect of it, or make it less a distinct enactment from that with which it is connected. It expressly provides that the exception which is to relieve the defendant from the penalty is to be pleaded as matter of defence. That demonstrates that it was the intention of the legislature, that the exception was to be considered as a distinct provision, and to be construed by the rules applicable to distinct provisoes, and not as part of the enacting clause. Statutes when printed are divided into sections for mere convenience; but in the rolls of parliament, there is nothing to distinguish one section from another. The accidental circumstance of printing this proviso in the same section does not so incorporate the one with the other, as to render it necessary to take notice of it in pleading. It forms no part of the enactment, and therefore there is no ground for the first objection. On the other point I entertain some doubt, but we shall give our opinion upon it to-morrow.

HOLROYD, J.—I also think that there is nothing in the first point. The proviso is perfectly distinct from the enacting part of the section, and the exception therein contained is by the express direction of the legislature to come as matter of defence. If a defendant has such a certificate as is there mentioned, it will be a complete answer to an action; but the burthen does not lie on the plaintiff to negative the existence of such a certificate. This proviso is not a qualification of what went before, but a distinct enactment. The reason why in actions on the game laws the exceptions are to be negatived is, that those laws are not a restraint upon all persons, but only upon those who are not qualified to kill game, and therefore the qualification must be negatived. If indeed the proviso here had restrained the operation of the preceding section, and had been incorporated with it, the exception must have been negatived. (a) But that is not the case, and therefore it

(a) Plowd. 376. 410.

1824.
Wells v. Iggulden.

comes within the rule laid down in *Plowden* (*a*) with respect to provisoes in a deed. The plaintiff, in order to take advantage of the deed, may plead it without the proviso, and it is no variance; and it lies upon the defendant to bring himself within the proviso.

Littledale, J. concurred upon the first point.

On the following day judgment was given on the other point, as follows, by

Bayley, J.—This was an action brought upon the statute 55 *Geo.* 3. c. 137. s. 6., to recover penalties against an overseer for supplying provisions to the poor of his parish for his own profit; and a motion was made in arrest of judgment, on the ground that no one of the counts of the declaration alleged, either in the introductory part, that the defendant, "not regarding the statute," committed the offence, nor in the concluding part, that the offence was committed "against the form of the statute." The counts, however, did conclude with the allegation "whereby, and by force of the statute in such case made and provided, the defendant hath forfeited for his said offence the sum of 100*l.* and thereupon an action hath accrued," &c.; and it was insisted, on the part of the plaintiff, that that might be considered as a substantive allegation that the act was against the statute, and would so supply the other defect. But it is to be observed, that those words are stated as an inference of law, arising from the premises, and giving a description of the party as having forfeited the penalty for his *said offence;* and therefore unless there is what may be considered as an offence effectually charged in the earlier part of the count, the count cannot be supported. Now there are very many cases which establish the position, that in indictments for offences created by statute, or even in actions upon statutes giving penalties to the parties grieved, it is essential to state

(*a*) Plowd. 110.

1824.

WELLS v. IGGULDEN

that the act charged has been done against the form of the statute. Thus it is laid down in Doctr. Plac. 332. that "If an action be brought against a man on a statute, the plaintiff should recite the special matter, and say, that it is against the form of the statute;" and Lord *Hale* lays down the same rule with respect to indictments, and says, "If an offence be newly enacted, or made an offence of a higher nature, by act of parliament, the indictment must conclude contrà formam statuti." (*a*) The same doctrine will be found also in *Bennett* v. *Talbois* (*b*), and was distinctly under the consideration of the Court in the more recent case of *Lee* v. *Clarke*, in which the former authorities were all reviewed, and the opinion of the Court delivered after full attention to the subject; and that I consider as establishing that in a penal action it is essential to allege that the offence charged was done against the form of the statute. There is one earlier decision to the same effect, which I have omitted to notice, I mean *Andrew* v. *The Hundred of Lewkner* (*c*). That was an action "upon the statute of *Winton*, 13 *Ed.* 1., and the plaintiff shewed that he had performed the limitations and ordinances in the statute 27 *Eliz.* c. 13. and concluded *contrà formam statuti prædicti*, and it was alleged in arrest of judgment, that the declaration was not good, because he, having declared on two statutes, ought to have concluded *contrà formam statutorum prædictorum*. But *non allocatur per totam Curiam*, because the action is given only on the 13 *Ed.* 1., and the 27 *Eliz.* is rather in restraint and hindrance of the action than otherwise:" and a similar decision was come to in *Merrick* v. *The Hundred of Ossulston* (*d*). Subsequent to the determination of *Lee* v. *Clarke*, is that of Lord *Clanricarde* v. *Stokes*, in which the same doctrine was again laid down; and though it was there considered that the declaration did

(*a*) 2 Hale, P. C. 189. 192.
(*b*) 1 Ld. Raym. 149. 5 Mod. 307. S. C.
(*c*) Yelv. 116. Noy. 125. Cro. Jac. 187. S. C.
(*d*) Cas. Temp. Hardw. 409. Andr. 115. S. C.

1824.
WELLS
v.
IGGULDEN.

in effect contain the allegation in question, it is still an authority for holding that the allegation is necessary. The case of *Coundell* v. *John* was one which, in the progress of the argument, raised some degree of doubt in my mind, and therefore I was desirous of adverting particularly to it, for the purpose of seeing whether it did in effect militate against the general doctrine to be found in the other authorities upon the point. According to the report of that case in *Salkeld*, it certainly would appear that the allegation "contrà formam statuti," even in an action on a penal statute, which gave a right of action where none existed before, was not necessary. It is however pretty clear, upon referring to the other reports of the case, and particularly that which is given by *Fortescue* (*a*), who himself argued the case, that the question as stated by *Salkeld* could not have arisen, and that the decision could not have proceeded on that ground. That was an action against a person who was a wrongdoer, and there were two questions to be decided; the one, whether the action could be maintained at common law; the other, whether, as the declaration was framed, the plaintiff was entitled to recover upon the statute 7 and 8 *Will.* 3. c. 25. It was not, therefore, a question whether in an action brought upon that statute it was necessary that the declaration should conclude "contrà formam statuti," but whether, framed as that declaration was, the Court could say, that it was a declaration upon that statute; and they held that they could not. That case, therefore, as it seems to me, did not call for the doctrine reported by *Salkeld* to have been there laid down; and I think he was clearly mistaken as to the foundation of the judgment there; consequently it does not seem to me to bear in favour of the present plaintiff. And, inasmuch as this is a penal action, brought, not by a party grieved, but by a stranger, and founded wholly upon the statute, it appears to us, upon the authorities, that the statement of the offence charged is insufficient, unless the facts constituting the offence are

(*a*) Fortescue, 104, under the title of "Kendall *v.* John."

1824. WELLS v. IGGULDEN.

set out, and it is stated as a substantive allegation, as part and parcel of those facts, that the offence was committed against the form of the statute. For these reasons we are of opinion, that the rule for arresting the judgment must be made absolute. It is a satisfaction to me, personally, to know, that as this decision is founded upon an objection arising on the record, the party, if he should be dissatisfied with the opinion of this Court, will have the opportunity of taking the opinion of a Court of Error.

Rule absolute.

D. C. GUTHRIE and R. BUNYON, Assignees of FREDERICK SAVERY, a Bankrupt, v. H. FISK and J. S. PATTESON, two of the Directors of the NORWICH Union Society, for the Insurance of Lives and Survivorships.

By a private act of parliament, intitled "An act to enable the *Norwich* Union Society to *sue* in the name of their secretary, and to be sued in the names of their directors, treasurers, and secretary," that society were empowered to commence and prosecute all *actions* and *suits* in the name of their secretary, as a nominal plaintiff:—Held, that that did not empower the secretary to sue out a commission of bankrupt on the behalf of the society, against a person indebted to them as a society.

ASSUMPSIT for money had and received by the defendant, to and for the use, and on account of, *Frederick Savery*, and for money due on an account stated with him, before he became bankrupt. There were also counts for money paid by the plaintiffs, as such assignees, for the use of the defendants; for money had and received by the defendants to and for the use, and on account of the plaintiffs, as assignees; and for money due on an account stated with the plaintiffs as assignees, since the bankruptcy. The defendants pleaded the general issue, and gave notice of a set-off. At the trial before *Abbott*, C. J. at the *London* Sittings before *Michaelmas* Term, 1822, the plaintiffs were nonsuited, on the ground of a variance between the commission of bankrupt against *Savery*, and the petition and deposition of the petitioning creditor, whereon it was grounded. The variance was afterwards removed by an order of the Lord Chancellor, and in the *Michaelmas* Term following, a rule

nisi was obtained for setting aside the nonsuit, and granting a new trial; and on cause being shewn, as there still appeared to be a question arising on the validity of the commission, the Court directed the facts to be stated, for their consideration, in the form of a special case; which was as follows:—

By the act of the 53 *Geo.* 3. c. 216. intitled "An act to enable the *Norwich* Union Society for insurance against loss by fire, to sue in the name of their secretary, and to be sued in the names of their directors, treasurers and secretary," after reciting among other things, that several persons had formed themselves into a society, under the name of the *Norwich* Union Society for Insurance against Loss by Fire, and had raised considerable sums of money in order to insure each other, and all persons becoming members of the said society, from and againat all loss and damage happening by means of fire to buildings, houses, goods, merchandizes and effects, belonging to any member or members of the said society in any part or parts of *Great Britain*, other than and except the city of *London*, and the liberties thereof, and the several other places within the weekly bills of mortality; and that all persons insuring in or with the said society were members thereof to all intents and purposes, and entitled to all the advantages thereof; and that difficulties had arisen, and might from time to time arise, in recovering debts due to the said society, and also in prosecuting persons who might steal or embezzle the property of, or who might commit or be guilty of any other offence against, or with intent to injure or defraud the said society, since by law the individual members of the said society must in such cases sue and prosecute by their several and distinct names and descriptions. And further reciting, that difficulties might from time to time arise in recovering debts owing by the said society to the individual members thereof, and other persons dealing therewith, and that it was therefore expedient that such individual members, and other persons, should be thereby enabled to com-

1824.

GUTHRIE v. FISK.

mence and prosecute suits and actions at law, and to sue out execution upon judgments obtained by them against such directors and officers of the said society as were thereinafter mentioned: it is enacted, "That all actions and suits to be commenced or instituted by or on behalf of the said society against any person or persons, or body or bodies politic or corporate, shall or lawfully may be commenced or instituted and prosecuted in the name or names of the secretary or secretaries, for the time being, of the said society, as the nominal plaintiff or plaintiffs for, or on behalf of the said society; and that all actions and suits to be commenced or instituted against the said society, shall be commenced, instituted, or prosecuted against any one or more of the directors, or against the treasurer or treasurers, or against the secretary or secretaries, for the time being, of the said society, as the nominal defendant or defendants for and on behalf of the said society; and that all prosecutions to be brought, instituted, or carried on by or on behalf of the said society, for fraud upon or against, or for embezzlement, robbery, or stealing of the property of the said society, or for any other offence committed against, or with intent to injure or defraud the said society, shall or lawfully may be so brought or instituted and carried on in the name or names of the secretary or secretaries for the time being of the said society; and in all indictments and informations, it shall be lawful to state the property of the said society to be the property of the secretary or secretaries for the time being of the said society; and any offence committed with intent to injure or defraud the said society, shall and lawfully may in such prosecution be said to have been committed with intent to injure or defraud the said secretary or secretaries for the time being of the said society, and any offender or offenders may thereupon be lawfully convicted of any such offence; and the death, resignation, or removal, or other act of any director or directors, treasurer or treasurers, or secretary or secretaries of the said society, shall not abate any such action, suit, or prose-

cution." The case then recited other sections of the same statute, not necessary here to set out. By 55 *Geo.*3. c.215. intitled "An act to enable the *Norwich* Union Society for the insurance of lives and survivorships, to sue in the name of their secretary, and to be sued in the names of their directors, treasurers, and secretary," the same enactments and provisions are made for and on behalf of the said "*Norwich* Union Society for the insurance of lives and survivorships, as are made in the act hereinbefore set forth for and on behalf of the *Norwich* Union Society for insurance against loss by fire." The defendants are, and at the time of making out the deposition of bankruptcy hereinafter mentioned, were two of the directors of the *Norwich* Union Society for the insurance of lives and survivorships; and the same persons are likewise directors of the *Norwich* Union Society for insurance against loss by fire. *Frederick Savery*, before his bankruptcy, was a marine insurance broker at *Bristol*, and agent at that place for both the *Norwich* Union Societies, and as such agent was in the habit of corresponding with, and rendering his accounts to one *Samuel Bignold*, who held the office of secretary to both the said *Norwich* Union Societies. On the 10th of *June*, 1820, a commission of bankrupt was issued against *Savery*, upon the petition of the said *Samuel Bignold*, who was described in the petition as "secretary to the *Norwich* Union Society for insurance against loss by fire;" which petition stated, "that the said *Frederick Savery* was indebted to the said society in 100*l*. and upwards, for premiums of insurance against fire, had and received by the said *Frederick Savery* to the use of the said society;" and upon this petition a commission of bankrupt issued against the said *Frederick Savery* under the great seal, bearing date on the same day.

The questions for the opinion of the Court are:—first, Whether it was competent to the secretary to petition for and sue out a commission of bankrupt, in manner mentioned in the case, upon a debt due to the *Norwich* Union

1824.

GUTHRIE v. FISK.

Society; and second, If it was not, whether the defendants can make that objection. If the Court shall be of opinion that it was competent to the secretary to petition for and sue out the commission, or that the defendants cannot make that objection, the nonsuit is to be set aside on payment of costs, and a new trial had:—if otherwise, the nonsuit is to stand.

Tindal, for the plaintiffs. On the first point, from the nature and provisions of this act of parliament, the *Norwich* Union Company have power to sue out a commission of bankrupt; and on the second, the defendants, from the peculiar situation in which they stand, are estopped from making that objection. First, the act was a remedial act, and its object is set forth in its preamble, which recites "that difficulties had arisen, and might from time to time arise, in recovering debts due to the said society." The cause of passing the act, therefore, was that those difficulties might be removed. But they could not be completely removed, unless the power of suing out a commission of bankrupt was given; for there are many instances in which a debt cannot be recovered except by such means. By one part of the act the secretary is allowed to sign judgment and take out execution, and he may therefore be supposed to be allowed to sue out a commission of bankrupt, because that has been defined to be an action and execution in the first instance; *Twiss* v. *Massey* (a) and *Ex parte Freeman* (b). In *Ex parte Brown* (c) a commission of bankrupt is said to be not only an execution, but one of more extended force than an execution at law; which does not, however, vary the definition; and in *Ex parte Elton* (d), the present Lord Chancellor said, it "is not treated any longer as an execution at law, for," his lordship added as the reason, "the effects taken under it are not disposed of as at law, but fall immediately, by the direction of the sta-

(a) 1 Atk. 67.
(b) 1 Ves. & Bea. 41.
(c) 2 Ves. jun. 68.
(d) 3 Ves. 238.

1824.
GUTHRIE v. FISK.

tute, under the administration of this Court; which is to make an equitable distribution among the creditors, to admit all equitable claims upon the effects, and to divide them rateably." A commission of bankrupt does not materially differ in principle from an execution at law, if the steps in the proceedings in both cases are examined; and therefore, from that reasoning, and from the authorities cited, it seems very reasonable that an act of parliament passed for the purpose of removing difficulties in suing, should go the length of conferring the right of suing out a commission of bankrupt. To hold the contrary, would be to put a very narrow construction on the act; and it is hardly necessary to cite authorities for saying, that such an act ought to be construed liberally. In *Comyns's Digest* (*a*) it is said, " every statute ought to be construed according to the intent of the parliament;" and again, (*b*) " The Judges expound a case within the mischief and cause of an act, to be within the statute by equity, though it be not within the words:" and the latter principle, when applied to the present case, becomes quite decisive in favour of the plaintiffs. Secondly, the defendants are not in a situation to take advantage of this objection, even if it is tenable. They are, indeed, sued as directors of the society for the insurance of lives and survivorships, but they are also, in fact, directors of the society for insurance from fire, at the instance, and for the benefit of which, the commission of bankrupt was sued out; therefore they must be presumed to know of all the acts done by the authority of either society, and this act must be taken as done by their own authority. They are consequently estopped from disavowing that act, and cannot set up this objection. *Jacaud* v. *French* (*c*). [*Bayley*, J. That argument seems to me to present this difficulty. If the defendants are obliged to pay the sum of money claimed in the present action, and hereafter the pre-

(*a*) Tit. " Parliament." R. 10. (*b*) Ib. R. 13.
(*c*) 12 East, 317.

1824.

GUTHRIE v. FISK.

sent commission is superseded and a valid one sued out, they may be obliged to pay it over again, and that will be a great hardship upon them.]

F. Pollock, contrà. This commission cannot be supported; and therefore the plaintiffs cannot derive from it any right of action. To prove that, it is only necessary to refer to the language of the acts of parliament, by which creditors are entitled to sue out a commission of bankrupt. The first statute by which that power is given, is the 5 *Geo.* 2. c. 30. s. 23., for the 30 *Geo.* 1. was only temporary. By that it is enacted, that unless the sum due to the creditor amounts to 100*l.* the commission shall not issue. From that it appears, that the person petitioning must be a creditor, and that a debt of a particular amount must be due to himself, or himself and others, in order to come within the meaning of the statute. That the bankrupt laws must, in the first instance, be construed strictly, need not be contended, since they are introductory of a more summary mode of proceeding than was originally given by the common law. By the 5 *Geo.* 2. it is provided, that the debt must be a legal debt actually due, and the commission must issue on the petition of all the parties to whom the debt is supposed to be due. If one of the parties resides in a foreign country, and is there domiciled, so as to be considered as an enemy, a petition cannot be presented, nor a commission sued out. But in this case the facts are quite different. There is a continual change of partnership. The debt on which the commission has issued, is not due to the parties suing it out, but to different parties, who have taken their places. [*Bayley*, J. Suppose the debtor receives 10*l.* on ten successive days, and on every one of these days one member goes out and another comes in— would you bring one, or ten actions?] It must be admitted that the secretary might sue for several sums of money, received at different times for the use of the company, in one action; but non constat that he may sue out a commis-

1824.

GUTHRIE v. FISK.

sion of bankrupt. Then, as to the construction of this particular act of parliament, since it is insisted that the secretary may sue out a commission of bankrupt by force of its provisions, it must be construed with the same strictness as the general bankrupt laws. It is an act passed for the special benefit of the *Norwich* Union Society, and they are empowered to proceed in a manner different from the usual course of the common law. Now there is no instance where a private act of parliament, passed for the benefit of individuals, has been construed liberally, or beyond the letter. If it had been the intention of the legislature to give the society power to issue a commission, it would have been stated; but there is nothing introduced about a commission of bankrupt at all. It was probably wished to remedy the difficulties experienced by the society in the recovery of their debts, but as this was an extraordinary mode of proceeding, it may have been withheld purposely. Since the act ought to be strictly construed, those who would avail themselves of it must bring themselves clearly and fully within the terms of it, which these plaintiffs certainly have not done. It may be observed in addition, that the power now claimed by the plaintiffs would be quite subversive of the provision in the 23d section of the 5 *Geo.* 2. c. 30., because it is clear that the secretary could not give the bond which is thereby required to be given.

Tindal, in reply. The last argument is of no weight, because where a commission is founded upon a debt owing to several parties, a bond given by any one of them, is sufficient to satisfy the requisition of the statute. [*Holroyd*, J. It is by no means a matter of course, that the secretary should be one of the creditors, for he may hold the office of secretary without being a member of the society, and then he would not be a creditor.]

BAYLEY, J.—In this case I think the commission cannot be supported. This is only a modern act of parliament,

1824.

GUTHRIE v. FISK.

and unless we can see clearly that it was the intention of the legislature, we are not at liberty to go beyond the words of the act. It would be introducing a dangerous rule of construction, if we were to introduce words extending an act of parliament farther than the mischief specially provided for. This was an act passed for the purpose of enabling the *Norwich* Union Society to sue in a manner different from that allowed at common law. It passed at a time when the remedy by a commission was perfectly well known as one of the modes by which a creditor might enforce payment, not merely of his own debt, but of those of all the creditors; and if it had been the intention of the legislature to go beyond the ordinary mode, one would have supposed the power to sue out a commission would have been given in express words; for although a commission is a species of writ, it is not ordinarily called so. Mr. *Tindal* admits that these words would not be sufficiently large to include a commission of bankrupt, unless by considering the preamble a larger meaning can be given to them than primâ facie they would otherwise import. Now the preamble only mentions, that difficulties had arisen in recovering debts, which must mean the ordinary difficulties arising in recovering debts, and therefore provides the ordinary means by which those difficulties may be obviated, but does not extend to those extraordinary cases where a commission of bankrupt might become necessary. And then, as to the act itself, there are no words subsequently which can bring it within that species of cases. The enacting words are confined to "all actions and suits," which can by no means be extended so far as to mean the suing out commissions of bankrupt. Besides, I think that if we look at the 5 *Geo.* 2. we shall find very great difficulty in reconciling such a power with the provisions of that act. By that it is required, that the *creditor* shall sue out the commission. The secretary is not a creditor. The creditor is to give the bond. By whom is the bond to be given in this case? Not by the secretary, but by some person who is substantially the cre-

ditor. There is a power given in the 5 *Geo.* 2., by which damages may be recovered in case of a malicious commission issuing; but no such provision is made by this act. There are no words referring to an occasion, in which such a difficulty might arise. And yet this act was substantially prepared by the company themselves, and as they have not thought proper to insert language to this effect, are we authorised in extending the language of the act to cases for which they have not themselves provided? Upon the whole, I think this commission cannot be supported. The rule, therefore, for setting aside the nonsuit must be discharged.

HOLROYD, J.—I think the commission cannot be supported. There are no words in the act expressing the intention of the legislature to give this society the power of suing out a commission of bankrupt. In taking proceedings at common law, there must be very great difficulties arising from the change of members, but those are greatly obviated by the society being enabled to sue in the name of the secretary as the nominal plaintiff. Where an act of parliament is passed, by which peculiar privileges are conferred on certain individuals, the act is to be construed as the language of those parties by whom the enactment is procured. It is a private act of parliament, and therefore must be construed strictly, and cannot be carried any further than the words import: and I see nothing to shew that the act gave the society the power to sue out the commission. Supposing there had been a power given to the secretary to sue out a commission, the 100*l.* might not be due to the then existing members, but might be due to persons who had resigned. It does not appear that the secretary was a member of the society, and the petition does not state whose debt it substantially is, so that although he sues upon the debt, non constat that it is his debt. And therefore, in case of a commission being sued out maliciously, the person aggrieved would not know against whom he ought to bring

1824. GUTHRIE v. FISK.

his action. For these reasons I am of opinion, that the rule for setting aside the nonsuit ought to be discharged.

LITTLEDALE, J.—The parties here can have no other mode of recovering their debts, than that strictly and specially pointed out in the act itself. It is admitted, that a commission of bankrupt is not an action or suit. A *scire facias* was formerly thought not to be an action or suit; but it has been since held to be so. Co. Litt. *505. 507. I think that a commission of bankrupt cannot be considered in the same light as an execution, although they have been compared; since they are dissimilar in their effect, the one being an execution under the authority of statutes, and the other an execution at common law. Upon this point, I would here refer to the opinion of Lord *Ellenborough* in the *King* v. *Lopez*.(a) Now, supposing this act out of the question, then the members might have sworn that the defendant was indebted to all the persons then in the society. If that was not proved by evidence, then the defendant might shew that the debt was misdescribed. But in this case if it be wrong, it would be impossible to shew that it was wrongly described. The rule for a nonsuit must therefore be made absolute.

Rule absolute.

(a) East, 230 and 232.

R. MORRIS, J. H. RENNY *v.* E. ROBINSON.

Where the master of a ship on a voyage from *Calcutta* to *London*, laden with indigo, was obliged to put into *Mauritius* from unseaworthiness, and there abandoned, ship and cargo, which were bonâ fide sold by public auction under the orders of the Vice-Admiralty Court:—Held in assumpsit by the owner against the purchaser of the indigo; 1st. That there being no pressing necessity for the sale, the master could confer no title upon the vendee. 2d. That a judgment in tort against the owner of the vessel for not delivering the cargo, pursuant to the bill of lading, was no bar to this action; and 3d. That an unavailing demand of the proceeds in the Vice Admiralty, did not prevent the plaintiff from recovering the full value of the indigo from the defendant.

ASSUMPSIT for money had and received. Plea non assumpsit, and issue thereon. At the trial before *Abbott*,

C. J., at the *London* adjourned sittings after *Trinity* Term, 1823, a verdict was found for the plaintiffs damages 7000*l.*, subject to the opinion of the Court upon the following case:

The plaintiffs, and the defendant, are respectively merchants residing in *London*. On or about the 3d *December*, 1820, the house of *M'Intyre* and *Co.* of *Calcutta*, merchants, shipped on board the *Lady Banks*, *Isaac Vallance* master, 140 chests of indigo, the property, and on account and risk of the plaintiffs, under three several bills of lading signed by the captain, one for 72 chests, one for 45, and one for 23, total 140. By which bills of lading, the indigo was to be delivered, in the port of *London*, to the plaintiffs or their order. The *Lady Banks* sailed from *Calcutta* on the 21st *December*, 1820, with the 140 chests of indigo on board, and a cargo of various other merchandise, bound for the port of *London*, and in the progress of the voyage met with a gale of wind while lying in *Madras Roads*, but proceeded from thence and put into *Trincomalee*, where considerable repairs were done to her. She sailed from *Trincomalee* on the 17th *February*, 1821, for *London*, and again met with tempestuous weather, which occasioned her to become very leaky. During the last mentioned weather, about 600 bags of sugar were necessarily thrown overboard, and with much difficulty the ship was conducted to the island of the *Mauritius*, where she arrived on the 24th *March*, 1821, and assistance being procured, she was run upon a mud bank, with a view to the preservation of the ship and cargo, and it was necessary that the ship should be wholly unloaded, and hove down, in order to examine and repair the damage which had been sustained. The captain, by the advice of the agents whom he employed, residing at *Port Louis*, in the said island, employed a proctor; and on the 24th *March*, petitioned the Vice-Admiralty Court of the island, and under an order made by that Court, the cargo was landed and deposited in warehouses. An accidental

1824.

MORRIS v. ROBINSON.

fire having happened at the warehouse where part of the cargo had been deposited, great part thereof was burnt or materially damaged, and was sold by auction; and 21 chests of indigo were, by the proceedings of the Admiralty Court afterwards referred to, reported to be damaged, and were also sold by public auction, but those form no part of the demand in the present action. After the sale, there remained of the whole cargo only 119 chests of the indigo comprised in the bills of lading, and 2 sample chests of indigo, 30 casks of tallow, some buffaloes' horns and a few packages of small value. In pursuance of an order of the said Vice-Admiralty Court, the ship was surveyed, and an estimate was made by competent persons on oath, that the necessary repairs and other incidental expenses, to enable the ship to perform her voyage to *England*, would amount to the sum of 25,669 dollars; and the surveyors reported that if the ship had these repairs done to her, she would then be a good sound ship. Two merchants, however, residing at *Port Louis*, declared upon their oath, in the proceedings in the Vice-Admiralty Court, their belief, that the expense of the repairs would far exceed the value of the ship when repaired. The captain had no funds, and could not procure any to pay for the repairs, except by sale of part of the cargo; but there was an opportunity to tranship the indigo from the *Mauritius* for *England*, soon after the arrival of the vessel there, and such opportunity afterwards again occurred. On the 8th *May*, on the petition of the proctors employed by the captain, the Judge of the Vice-Admiralty Court made an order, of which the following is a copy: "Under the circumstances stated and sworn to, I consider that to force the captain to repair the *Lady Banks* would be a great hardship upon his owners, and therefore as far as my authority goes, I authorise the sale of the said ship with all her appurtenances, as set forth in the petition, upon the condition that the said ship be first broken up as a ship not only unseaworthy but unfit to be repaired." A warrant of sale was afterwards issued

containing the above condition, and directing the proceeds to be paid into the registry of the Court, there to remain until those who were entitled thereto should call for them. The ship was in fact afterwards repaired at *Port Louis* in the *Mauritius*, but, under the circumstances, the captain, bonâ fide believing that the repairs would have cost at least as much as the estimate before mentioned, thought it best for the interests of all concerned, to abandon her and the residue of the cargo, and he accordingly entered protests to that effect on the 9th *May*, 1821. On the 12th *May*, the Judge made another order, of which the following is a copy: "The registrar having stated to me that the master of the *Lady Banks* has abandoned the ship and her stores to the insurers, in which I conceive him to be fully warranted, under all the circumstances of the case, the hull of the said ship may be sold, without any condition as to the breaking of it up." The ship was accordingly sold by auction on the 14th *May*, for 1946 dollars, and her stores, &c. for 7,303 dollars. The ship sailed from the *Mauritius* on a voyage to *China*, on account of the subsequent purchaser. After three surveys ordered by the Vice-Admiralty Court, upon the 119 chests of indigo which remained, and the reports of the surveyors thereupon, that they were sound, the Judge made an order, that the goods should be sold by public auction, and the proceeds immediately lodged in the registry of the Court. The 119 chests of indigo were in pursuance of that order sold by public auction, by the deputy marshal of the Court, after having been advertised in the gazette, and otherwise notified to the inhabitants of the island in the most public manner, and in such advertisements and notifications it was stated, that the indigo was part of the cargo of the *Lady Banks*, and would be sold by auction by the order and under the authority of the Vice-Admiralty Court. The agent of the defendant, then being at the *Mauritius*, (who was no party to the proceedings in the Vice Admiralty Court,) attended in consequence of the public notification of the sale, and either by himself or a

1824. MORRIS v. ROBINSON.

broker whom he employed, became the purchaser of 20 chests of indigo, and paid the price for the same into the registry of the Court, and the indigo was delivered to him. The defendant's agent afterwards employed a broker to purchase some more of the indigo for him; and a few days after the sale by auction, the said broker purchased from Messrs. *Blaize* and *Baudet*, merchants at *Port Louis*, 32 chests of indigo, which they had previously purchased at the auction, and agreed to give an advance of 5*l.* and a half per cent. upon the price which Messrs. *Blaize* and *Baudet* had paid for the same at the said public sale. That sum was paid, and the 32 chests of indigo were received by the defendant's agent. The damaged part of the cargo, which was first sold, produced 11,879 dollars, and the 119 chests produced 52,321 dollars; and the amount thereof, and of the proceeds of the ship and stores, reduced by means of the incidental expenses to 53,846 dollars, or 8109*l.* 6*s.* 11*d.* sterling, have been remitted by the register of the Vice-Admiralty Court to the High Court of Admiralty in *England*, and now remain in that Court. The 52 chests of indigo purchased by the defendant's agent formed part of the indigo mentioned in the three bills of lading, and in the following proportions: 15 chests, part of the 72 chests in the first bill of lading; 19 of the 45 in the second; and 18 of the 23 in the third. On the 12th *June*, 1821, 20 of the said 52 chests of indigo were shipped on board the *Woodbridge*, and on the 12th *July*, 1821, the remaining 32 chests were shipped per the *Asia*, for the port of *London*. Both those ships arrived in that port in the month of *October*, 1821, and the 52 chests have been delivered to the defendant. Soon after the said indigo arrived in the port of *London*, the plaintiffs gave notice to the defendant that they were the original proprietors of the said 52 chests, and claimed the delivery thereof to them, but the defendant refused to deliver them, and has since sold and disposed of the same, and received the proceeds thereof. In respect of the said 72 chests of indigo contained in the bill of lading

first mentioned, the plaintiffs have commenced an action against the owners of the ship *Lady Banks*, for not carrying the same indigo to *London*, but selling the same unlawfully, as it was alleged, at the *Mauritius;* and the plaintiffs have recovered a verdict against the said owners in that action, under which they will be entitled to receive from the said owners to the extent of the value of the ship and her freight; but it is admitted that the sum they will receive therefrom will not exceed 1500*l.*, and the said 72 chests of indigo were of the value of 7000*l.* and upwards. The defendant shall be at liberty to refer to a copy of the issue in the said action, which is to be considered as part of this case. In respect of the said 45 chests of indigo, in the said second bill of lading mentioned, the plaintiffs, after they had received information of the sale of the said indigo under the circumstances aforesaid, executed and sent out a power of attorney to Messrs. *Saunders* and *Wicke* of the *Mauritius*, empowering them to claim and receive out of the said Vice-Admiralty Court, the sum which was produced by the sale of the said 45 chests. Messrs. *Saunders* and *Wicke* did accordingly apply to the registrar of the said Vice-Admiralty Court, and claimed to receive such proceeds, but the same had then been remitted to *England*. In respect of the said 23 chests of indigo, in the said third bill of lading mentioned, the plaintiffs have not taken any measures nor pursued any remedy, except the proceeding in the present action. Either party to be at liberty to refer to an office copy of the proceedings in the said Vice-Admiralty Court transmitted to this country, and to make the same use thereof as if it had been inserted in this case. The said 52 chests of indigo so purchased by the defendant's agent were sound and in good order, and free from damage, when the same were purchased by him at the *Mauritius*, and when they came into the possession of the defendant himself in *London*. It was agreed, and admitted at the trial, that the plaintiffs having recovered a verdict in the said action against the owners of the said ship, in respect of the indigo mentioned in the said first bill

1824.
MORRIS
v.
ROBINSON.

of lading, and having sent out such power of attorney as aforesaid, in respect of the indigo mentioned in the said second bill of lading, should not prejudice or affect their right of recovery in respect of any other part of the said indigo, besides the particular chests for which the said action was brought, and the said power of attorney sent out, respectively; but in regard to the particular chests for which the said verdict had been obtained, and the said power of attorney had been sent out, the defendant was to be at liberty to derive such advantage as those circumstances would afford him. The question for the opinion of the Court is, whether the plaintiffs are entitled to recover in this action for all, or any, and what part of the said 119 chests of indigo. If the Court shall be of opinion that the plaintiffs are entitled to recover for the whole or any part, the verdict to be entered accordingly, and the amount of the damages to be settled out of Court. If the Court shall be of opinion that the plaintiffs are not entitled to recover for any part, a nonsuit to be entered.

F. Pollock, for the plaintiffs. In this case there are two points to be considered. First, whether, under all the circumstances, the captain was or was not justified in selling the cargo, and the plaintiffs ever had or had not a right of action in respect of it: and second, whether their subsequent act in claiming the proceeds was or was not such an acquiescence in that sale as to deprive them of that right of action, if they ever had it? Now there was no absolute necessity for the sale, for the goods were neither damaged nor of a perishable nature; nor did any necessity for the sale arise from the state of the vessel. But it is now well established, that it is only in cases of extreme and absolute necessity that the captain is authorised to sell; and consequently this sale, having been unauthorised and illegal, did not pass the property in the goods to the vendee. It is incumbent upon those who buy goods under such circumstances, to ascertain whether the sale is authorised, and if

they chuse to become purchasers at all events, they must do it at the risk of the vendor not having authority for the sale. It will be argued on the other side, that the Court of Admiralty authorised the sale, and thus rendered it binding and valid; but it is quite clear, as a matter of law, that that Court had no jurisdiction for such a purpose, and therefore such an interference could give no more validity to the sale than if it had taken place without the interposition of the Court at all. The first purchase made by the defendant is at a sale by public auction, and the other is within a few days afterwards, when he takes the contract of another person, which had been also made at the public sale; therefore he has no better title from the private purchase than from that made at the sale by auction: and the plaintiffs are equally entitled to recover in both instances. But it will be said, that the plaintiffs, by bringing an action against the owners of the vessel, have lost their right to maintain the present action. To that, however, there are two sufficient answers. First, until they have actually entered up judgment in that suit, the plaintiffs are at liberty to discontinue it; and the defendant could not have pleaded that action in abatement, even if the two suits had been concurrent. Secondly, the remedy in that action is confined to the value of the ship and freight; and it is found by the case, that the utmost the plaintiffs can recover, as the fruits of that action, will be 1500*l.*, whereas the value of the indigo comprised in the first bill of lading exceeds 7000*l.*; consequently the plaintiffs, when they have actually received the 1500*l.*, have a right to apply it to that part of the indigo in the first bill of lading which did not get into the possession of the defendant. Then, with respect to the power of attorney to claim the proceeds vested in the Vice-Admiralty Court, as nothing was in fact done under it which could estop or bind the other party, the mere act of sending it out and making an ineffectual application under it, cannot operate as an estoppel to the plaintiffs. He cited *Freeman* v. *The East*

1824.

MORRIS v. ROBINSON.

India Company (a), and relied upon it as an authority decidedly in point, and decisive of the present case.

Campbell, for the defendant. The sale, which was made under the authority of the Vice-Admiralty Court, transferred the property in the goods from the plaintiffs to the defendant, the purchaser. There is no distinction between the chests purchased directly at the sale, and those afterwards purchased from another purchaser; they all rest upon the same foundation; and the property in the first being transferred by the authority of the Vice-Admiralty Court, the property in the others follows as a matter of course. The transaction is entirely free from fraud. It is allowed that all parties acted bonâ fide. The captain would have been justified in selling the cargo as the only resource within his reach of procuring funds to pay for the necessary repairs of the vessel, and if he had done that, the plaintiffs would have been in a worse situation than they are now; for then he would have had no cargo to bring home, and no part of the indigo would then have ever reached its place of destination. It has been argued, and perhaps with justice, that there was no absolute necessity for the sale, inasmuch as the case finds that there was an opportunity of transshipping the cargo. But if the captain acted bonâ fide, for the benefit of all the parties concerned, which the case also finds that he did, he cannot be blamed even though he acted injudiciously; and his act will nevertheless protect the foreign purchaser. Admitting that the captain did exceed his authority, and was guilty of a tort as between himself and the owner of the goods, still as he acted bonâ fide, and with honest intentions, a sale by him conferred a good title on the purchaser. The judgment of Lord *Stowell* in the case of the *Gratitudine* (*b*), as pointed out by *Best*, J. in his judgment in *Freeman* v. *The East India Company* (*b*),

(*a*) Ante, vol. i. 234. (*b*) 3 Robinson's Adm. Rep. 240.
(*c*) Ante, vol. i. 242.

may be said to be opposed to this argument, but the present case has an important feature which did not appear in that; because here the ship went to the *Mauritius*, which had been recently under the jurisdiction of *France*, and where the *French* law, which would have authorised the sale, still subsisted. [*Bayley*, J. We cannot in such a case as this take judicial notice of the *French* law, and its operation at the *Mauritius*. Besides, the Admiralty Court acts only upon the law of nations.] In the Prize Court, undoubtedly it does, but not in a case like the present. Under circumstances such as these, the Admiralty Court may rather be considered as a municipal Court, than as acting according to the law of nations. Suppose the transaction had occurred at *Martinique*, which is still a part of the *French* dominions, would not the captain, acting under the authority of the Admiralty Court there, and according to the existing law of the place, have been considered as acting legally? [*Bayley*, J. I very much doubt it, unless he had also received the authority of the owner to sell the goods.] Here the Judge of the Admiralty Court in an island, which in the present view of the case must be considered as a foreign island, takes upon himself the right of making a decree for the sale of the ship and cargo; is it not to be presumed that he had that right, and that in exercising it he acted according to the law of the place? That he might have such a power is perfectly clear, and that he in fact had it, must be presumed until the contrary is shewn; and if he had it, cadit quæstio, for then the captain acting under his authority was certainly justified, and a sale so made was valid. Then the action which the plaintiffs have brought against the owners of the vessel, in respect of these goods, is conclusive against their right to maintain the present action. The legal effect of that verdict is to legalise the sale, and to transfer the property in the goods to the defendant, for else the plaintiffs may bring as many actions against different parties as there have been separate sales, and may recover the full amount of their loss in each and

1824.

Morris v. Robinson.

all of them. By suing the owners of the vessel, and that also in an action of tort, the plaintiffs have made their election, and by that they must be bound. Lastly, even if the sale was unauthorised and illegal in the first instance, the plaintiffs, by sending out a power of attorney to receive the proceeds of it, and actually making application for those proceeds, have recognized and ratified the sale, and cannot now impugn it. The demand made upon the registrar by their agent, was equivalent to a personal demand by themselves. Suppose in the interval the commodity had fallen in price, the purchaser might have repudiated the contract, as one made without proper authority on the part of the seller, so long as the owner had refused to confirm the sale; but when the owner had confirmed the sale, as the plaintiffs have done, the purchaser was bound by the contract, and could no longer repudiate it: consequently the same result should, upon every principle of law and justice, operate to bind the owner. He cited *Reid* v. *Darby* (a) and *Cannan* v. *Meaburn* (b).

Bayley, J.—I am of opinion that there is no weight in any of the points raised on the part of the defendant; and that the plaintiffs are entitled to recover in this action. There is no doubt that the captain of a ship has authority, under certain circumstances, to hypothecate the cargo for the purposes of the voyage; but it is equally clear, that he has no right to take upon himself the character of agent to the owners, and to dispose of the cargo, except in cases of pressing and absolute necessity. This was decided in the case of *Freeman* v. *The East India Company*, which is in unison with the judgment of my Lord *Stowell* in the case of the *Gratitudine*. In this case the sale was conducted under the authority of the Vice-Admiralty Court, the Judge of which made a decree for that purpose: but without intending any disrespect to that Court, I am bound to express my opinion, that it had no jurisdiction in the matter, and no

(a) 10 East, 143. (b) 1 Bing. 243 & 465. S. C. 8 J. B. Moore.

1824.



MORRIS v. ROBINSON.

power to make any such decree. We can, therefore, only consider that decree in the light of the opinion of an individual resident on the island, who might or might not form a correct judgment upon the bearings of the case; but unless it appears plainly that the Vice-Admiralty Court had jurisdiction, which I have already said I am satisfied they had not, we cannot make their decision the foundation or the guide of our judgment in the case. What are the steps progressively taken by the Vice-Admiralty Court? First, they adjudge that the ship shall be sold, in order to be broken up; then, that it shall be sold generally, without any stipulation for its being broken up; and lastly, not having any jurisdiction in the matter, and without giving any intimation to the owner of the cargo, they confirm the abandonment of the cargo by the captain, and, upon their own authority, decree that it shall be sold. Where was the necessity for this measure? I can find none. The goods might have been trans-shipped, and forwarded to the place of their original destination; they were not in a damaged state; they were not of a perishable nature; they were not likely to fail of a market whenever they arrived in *London*. Yet all this is done behind the back of the proprietor; and it was clearly going beyond the limits of the authority of any Vice-Admiralty Court, to judge for itself of the necessity of such proceedings, and to consummate them without the knowledge of all the parties interested. The captain, therefore, having had no right to sell, no property was vested in the purchaser by such a sale. In this stage of the case two questions arise; one, whether any distinction can be made between that portion of the chests of indigo which formed part of the 72 in the first bill of lading, and those chests with respect to which the power of attorney was sent out; and the other, whether the sending out that power of attorney, and the subsequent claim of the proceeds made under it by the agents of the plaintiffs, ought to operate in bar of their present demand, or any part of it. With respect to the latter, if it is to operate as a ratification of the sale, it must deprive the plaintiffs of all

1824

Morris v. Robinson.

right to recover against the defendant in this action. Unquestionably the plaintiffs were at liberty, if they thought proper, to recognise and confirm the sale, and if they had done so, they would be no longer entitled to call upon the defendant for satisfaction, as they now do. But, as it seems to me, they have done no such thing. All they have done is this: finding that a wrongful sale of their goods had taken place, and being desirous if possible to obtain possession of the proceeds of that sale, they send out a power of attorney to certain persons resident at the *Mauritius*, empowering them to demand them on their account. The sending out the power of attorney for such a purpose as that, appears to me by no means to amount to a ratification of the sale. When the agents receive the power of attorney they do demand the proceeds, but they are unable to obtain them; and therefore, by the failure of that application, the plaintiffs are left in precisely the same situation as if they had never made any demand at all. Their option, therefore, to ratify or to renounce the sale, was still reserved to them; and the ineffectual attempt of their agents abroad to obtain the proceeds there, cannot deprive them of their right to call upon the defendant for compensation here. Then, with respect to the 15 chests out of the 72, the plaintiffs clearly had a right of action against the owners of the vessel, in consequence of the misconduct of the captain. They have brought that action, and they have subjoined to their declaration a count in trover; but it does not appear that any part of the 1500*l.* recovered in that action has yet been paid to them. There is no judgment entered up in respect of that sum, and therefore no actual satisfaction has in any way been made to them by the owners of the vessel. Can it be said that the plaintiffs are confined to the bare election, whether they will sue the owners of the vessel for the misconduct of the captain, or the present defendant, as being the purchaser of goods which have not been legally transferred to him? I think not. Even if they have made their election by suing the owners of the vessel, still that

cannot destroy their right to the goods as the proprietors of them. The jury who tried that action may not have given them damages to the full value of the goods, and they were not bound to do so. If the two actions had been concurrent, and had stood for trial on the same day, it is impossible to say that the act of bringing the former would have barred the right of the plaintiffs to maintain the present action in respect of such part of their demand as still remained unsatisfied. If the plaintiffs had brought actions against every one of the purchasers, and had recovered a full compensation from them all, a court of equity would give the parties so visited with damages, an opportunity of availing themselves of the verdict obtained against the ship owners, in order that the plaintiffs might not unjustly receive a double satisfaction; but until they have received more than they are entitled to, they are not precluded from bringing an action for any part of their loss which *still remains* unpaid. For these reasons I am of opinion, that the plaintiffs are entitled to recover in this action.

Holroyd, J.—I am of the same opinion. I am aware that it has been held, that in an action of trover, when the full value of the article is recovered by the verdict, the property is changed by the judgment and satisfaction in damages, and becomes vested in the defendant. But when the full amount is not recovered, the verdict does not change the property, and therefore is no bar to the plaintiffs recovering in other actions of trover against other persons who may have been guilty of a tortious conversion of any part of his goods in any other respect. In this case, it is quite evident that the plaintiffs did not recover full damages upon the count in trover; because the value of the goods specified in that count was 7000*l.* and upwards, and the verdict was 1500*l.* only, to which sum the verdict upon the other counts was as a matter of course confined. In the case of an action against the sheriff for an escape, the amount recovered from the sheriff does not operate as an

1824.
MORRIS
v.
ROBINSON.

extinguishment or satisfaction of the whole debt, and the plaintiff may still recover the whole amount from his creditor whenever he is able to find him, on that very ground. That shews, that the fact of the plaintiffs having recovered a verdict against the owners of the vessel, does not afford any legal ground either in bar or diminution of the sum which they seek to recover in the present action. With respect to the power of attorney, it is no answer to the plaintiffs' claim; for though a demand was made, no money was received under it, and therefore in the result nothing was done by means of it. As to the sale, the cases cited by my brother *Bayley* are decisive to shew, that it was unauthorised and illegal; I concur, therefore, in thinking that the plaintiffs are entitled to recover.

LITTLEDALE, J.—I am of the same opinion. It is not pretended that the sale was justified by necessity; and as to the decree of the Vice-Admiralty Court, if that Court had jurisdiction to interfere, and make such a decree, that should have been stated as a fact in the case, which it is not; it cannot, therefore, be presumed. Suppose an action had been brought against an officer of the Vice-Admiralty Court, and he had pleaded a justification, he must have set out in full the jurisdiction of the Court under which he acted. That Court certainly had not, by the law of nations, the power it exercised in this case; and it is quite clear that the High Court of Admiralty in *England* has never exercised such a power. The objection, that the plaintiffs have recovered in a former action against the ship-owners, is one merely technical, and may be fairly met by another technical objection, that no judgment has ever been entered up on that verdict. But, independently of that, it is clear that a recovery in a former action of trover is no bar to the present, unless a full compensation has been recovered; and here the amount of the debt is 7000*l.* and the verdict recovered is 1500*l.*; therefore, both in law and justice, the plaintiffs are entitled to recover the difference in this action. As to

the power of attorney, the fact was simply this, that the plaintiffs consented to waive the tort, and to accept the proceeds of the sale from the register of the Vice-Admiralty Court; but those proceeds they could not obtain, and therefore they have an undiminished right to recover the money by the present mode. In the case of a sale under an execution, where the defendant has become bankrupt, the assignees apply in the first instance to the sheriff, from whom they learn that the money has been paid over to the execution creditor, and that the goods were sold to such a person; they then bring their action against that person, and it is no defence to that action to say, that the plaintiffs had previously demanded the money of the sheriff. *Maestaers* v. *Fabrigas* (*a*). Upon these grounds, I am clearly of opinion, that the plaintiffs are entitled to recover from the defendant the full value of all the goods of which, under the circumstances of this case, he became the purchaser.

Judgment for the plaintiffs (*b*).

(*a*) Cowper, 161.

(*b*) Vide 2 Ld. Raym. 984. 2 Inst. 713.

ESDAILE v. OXENHAM.

A. having contracted to purchase an estate of B. procured the deeds of conveyance to be prepared at his own expense, and sent them to the latter for execution. When executed they were delivered to a servant to be returned, but the servant delivered them to C. an attorney, to whom B. was indebted for business done. In consequence of the refusal of other necessary parties to join in the conveyance, A threw up the contract and demanded the deeds of C. who refused to deliver them up until his demand against B. was satisfied:—Held, that trover would lie by A. against C. for the deeds in a cancelled, if not an uncancelled state; LITTLEDALE, J. dubitante.

TROVER for the recovery of certain deeds and stamped parchments. Plea, the general issue, and isue thereon. At the trial before *Best*, J. at the last *Lent* Assizes for the county of *Somerset*, the following appeared to be the facts of the case: In the year 1819, the plaintiff, a banker in *London*, contracted to purchase an estate in *Taunton*, partly freehold and partly copyhold, of the manor of *Taunton Deane*, from Messrs. *Brickdales*, bankers at *Taunton*, at the price of 2200*l*. The deeds were prepared, at the expense of the plaintiff, who, at the time of the contract, advanced to Messrs. *Brickdales* 1400*l*. in part of the pur-

1824. Esdaile v. Oxenham.

chase money. The deeds were deposited by the plaintiff's attorney in the hands of a Mr. *Kinglake*, the attorney of Messrs. *Brickdales*, to be executed. The deeds were accordingly executed by Messrs. *Brickdales*, and were handed by them to a servant for the purpose of being re-delivered to the plaintiff, but who in fact delivered them to the defendant, without any express direction what he was to do with them. The conveyance could not be completed without the execution of two other persons, who refused to act in the matter; and the plaintiff afterwards, but before the commencement of the present action, threw up the contract, and received back 1000*l*., part of the 1400*l*. which he had advanced. In the month of *November*, 1819, Messrs. *Brickdales* became bankrupts, and they were then, and still are, largely indebted to the defendant for business done by him for them as their attorney. In the month of *January*, 1823, the plaintiff demanded the deeds of the defendant, who said he had a lien upon them for a bill of costs due to him for business done for Messrs. *Brickdales*, as their attorney, and declared he would not deliver them up without having his bill discharged. The plaintiff never made any offer to pay the residue of the purchase money, but he did offer to the defendant to pay him any demand he might have in respect of his services in procuring the execution of the deeds. These facts being left to the jury, they found that the deeds had been sent to Mr. *Kinglake* by Messrs. *Brickdales*, without any intention that they should fall into the hands of the defendant; and that the defendant had retained them for his own personal demand upon Messrs. *Brickdales*, which had not arisen out of this transaction, and not for the purpose of securing the payment of the purchase money; and a verdict was accordingly entered for the plaintiff, with one shilling damages, with liberty for the defendant to move to enter a nonsuit, in case the Court should be of opinion that his lien could be supported.

In *Easter* Term last, *Adam* moved accordingly, and obtained a rule nisi; against which

R. Bayly now shewed cause. There can be no doubt that these deeds were purchased with *Esdaile*'s money, and engrossed at his expense, and therefore the property in the deeds must be in him only. The defendant, can have no pretence to detain them, except on account of some lien; and where an attorney has a lien upon deeds, he is bound, at the time of making a demand on them, to state what that lien is. He is not to say one thing when the demand is made, and then, when an action is brought, to set up a lien founded upon different causes. By such conduct the party waives his lien, which was Lord *Ellenborough*'s opinion in the case of *Bourdman* v. *Sill* (*a*). In order to give him any lien whatever on the papers, the defendant ought to have said that he detained them as the solicitor of Messrs. *Brickdales*, whereas he claimed to detain them for a debt due to himself. This action, therefore, is maintainable, though no tender was made, either of the rest of the purchase money, or in respect of the defendant's lien; and an action of trover differs from one of trespass; for in the former, direct possession is not necessary, as it is in trespass. This doctrine is laid down in a great many cases *Boardman* v. *Sill*, *Ogle* v. *Atkinson* (*b*), *Nicholson* v. *Chapman* (*c*), and *Lempriere* v. *Pasley* (*d*). In the defence at the time of the trial, it was stated, that *Oxenham* had a lien through the means of the *Brickdales*, but they expressly denied that they had given him any authority to that effect. The assignees, and all persons interested, are willing that the plaintiff *Esdaile* shall hold these deeds, for the benefit of all parties, as by the defendants holding them the property is locked up, and no person can avail himself of his respective share. The question, therefore, is, whether he ought not to obtain them from the defendant, who merely holds them on account of a debt due to himself. [*Bayley*, J. Supposing the purchaser had advanced a part

(*a*) 1 Camp. 410. note. (*b*) Marshall, 323. 5 Taunt. 759. S. C.
(*c*) 2 H. Bl. 254. (*d*) 2 T. R. 485.

1824. Esdaile v. Oxenham.

of this purchase money, has he a right to say that he is entitled to these deeds?] No; but here it is by the consent of all parties concerned; and their object will be answered sufficiently, if the deeds are delivered up to be cancelled: and *Oxenham* will have his remedy over against the *Brickdales*.

Adam, (with whom were *Scarlett* and *Jeremy*,) contrà. It is admitted that *Oxenham* was the attorney of the *Brickdales;* and on that account he would be entitled to retain these deeds against them as a security for the expenses he has incurred; consequently he would be equally entitled to retain them against all persons claiming under them. The deeds do not appear ever to have been in the possession of any other person than *Oxenham*. The objection that might apply to these deeds before they were executed, could not apply to them after their execution, because they could not then be treated as pieces of parchment. The plaintiff would not be entitled to the deeds until he had paid the whole of the purchase money; for otherwise he would be enabled to take possession of an estate amounting to 2200*l.* he having paid no more than 400*l.* If *Esdaile* is aggrieved, he has other means of obtaining relief against *Oxenham*, either by bill, or by a different form of action. This was an action of trover, brought to recover these pieces of parchment in the state and condition in which they were at the time when the action was brought; and therefore the plaintiff must make out a title to recover them as title deeds of the estate. He is not at liberty to treat them as pieces of parchment. Now he cannot be entitled to obtain the title-deeds of the estate, unless he has paid the whole of the purchase money, which he has not done; and therefore this action cannot be supported. [*Holroyd*, J. Perhaps these papers were only to be used by way of escrow.] If so, the case is stronger for *Oxenham*, for then the plaintiff would not be entitled to his action until the payment of the whole sum of money.

1824.

ESDAILE v. OXENHAM.

BAYLEY, J.—I am of opinion, that this action is maintainable, and that the verdict for the plaintiff is a right verdict. It appears by the finding of the jury, that *Oxenham* had no right to withhold these papers on the ground which he originally mentioned. The deeds were prepared on the behalf of *Esdaile*. He was at the expense of the stamps, and of their being engrossed, and at every other expense which was incurred prior to the period when they assumed the character of actual deeds; and they were therefore, to all intents and purposes, the property of *Esdaile*. If they were to be executed, for the purpose of the conveyance, would they so far change their nature as to become the property of the *Brickdales?* It was never the intention of any of the parties, that this property should vest in the *Brickdales*. The whole object was, that they should be the property of *Esdaile*. What claim then can *Oxenham* have for withholding these deeds on the ground of a debt being due to him, not from *Esdaile*, but from the *Brickdales?* In the foundation of *Oxenham*'s claim against the *Brickdales*, he says there was no purchase whatever, and therefore, upon his own shewing, he has no right of lien. As to the ground of defence, that the plaintiff cannot have a right to these title-deeds in an executed state until the concurrence of the *Brickdales* is obtained, and the payment of the purchase money completed, that is setting up the jus tertium—not the right of *Oxenham*, but the right of the *Brickdales*. The question here is, whether, at the time when this action was commenced, such a right to the property vested in the plaintiff as entitled him to recover. They were his parchment and his stamps, and he was at the expense of engrossment. Therefore, when they went out of the hands of his attorney for the purpose of being executed by the *Brickdales*, they were the property of *Esdaile*. If the *Brickdales* had never put their names to these deeds, who would have had a right to the parchment? Can there be any doubt that it would have been *Esdaile*'s property? When they were parted with by the plaintiff, and placed in

1824.

ESDAILE v. OXENHAM.

the hands of the defendant, they were not intended as an effectual conveyance of the property into the possession of *Esdaile*, until the payment of the residue of the purchase money. But it was the duty of the *Brickdales* to obtain the signature of all the other parties interested in this conveyance, and they ought not to have placed their own names to the instruments until they were sure that they would be executed by the other parties also. So if the defendant impeaches the title of *Esdaile*, by saying that the *Brickdales* had an equal right to the deeds, how did they obtain that right? Only by wrongfully putting their names to these deeds. As the names of all the parties were necessary, they ought to have had them all before they had done so. Therefore the execution of the deeds by the *Brickdales*, gave no title to *Oxenham* to withhold them, and did not destroy the right which *Esdaile* had to the parchment. It may be then said, that the parchment will be of no use to *Esdaile*. I cannot presume to know that. These are *ad valorem* stamps, and it may be that if the stamp office are satisfied that the stamps have not really been applied to use, they will (at least in justice they ought) restore a part of the value of the stamps. It may be said, that *Oxenham* has no right to cancel these deeds, and that therefore he cannot tell whether they are to be delivered up to *Esdaile* in a cancelled or uninjured state. That seems to me to produce no difficulty. He insists on the right of the *Brickdales;* let him confer with them, or with those persons in whom their rights are vested, and let them say whether or no they ought to be cancelled. I am of opinion, that this action is maintainable; for the original property of *Esdaile* in these deeds has never gone out of him. He is therefore entitled to have them delivered up to him, in a cancelled state, if the *Brickdales* shall require that they shall be cancelled.

HOLROYD, J.—There is strong ground to consider, that there has been a wrongful conversion in this case. These

deeds are not said to be the property of the defendant. A person, who has no right to hold them, retains them in his possession. There is a right of action, therefore, clearly made out. It is necessary, in the case of an agreement of this sort between vendor and vendee, that all parties in whose behalf the proceedings take place should execute the deeds. If that be not done, there is an end of the contract; and then the deeds become useless, and the vendee will have a right to bring his action to recover them. I think that if all the parties had executed, he would not have had a right to demand them, if he had not paid his purchase money. Suppose the demand had been made to the *Brickdales* to deliver them up, in a cancelled, or uncancelled state. If they had a right to cancel them, that does not authorize him to keep them.

LITTLEDALE, J.—I have very considerable doubt, whether the plaintiff has any legal interest in these deeds, whether cancelled or uncancelled. I think he would have no right to maintain trover for them, as actual deeds, if he had not paid the purchase money, and then the *Brickdales* would have a right to detain them, until he had paid the remainder of the purchase-money; and if he has not paid that, he has no right to bring detinue, since he has not a right to the deeds themselves. Supposing these deeds were delivered as an escrow, on the condition that the remainder of the purchase-money should be paid, the plaintiff ought to go into a court of equity, in order to have these parchments delivered up to him; but until they are cancelled, what right can he have to call upon the defendant for these deeds? He might have said had they been delivered to him defaced, "What right have you to cancel the deeds? I do not want them as mere waste parchment. You have been guilty of a conversion, therefore you are subject to an action." I have therefore very great doubt, whether the plaintiff had any title to them, whether as deeds, or as parch-

1824.



ESDAILE v. OXENHAM.

ments, but upon the opinions of my brothers *Bayley* and *Holroyd*, this rule must be discharged.

Rule discharged.

HOLMES *v.* LOVE and TUCKER.

The tenant of leasehold premises, by deed assigned his interest to trustees for the benefit of his creditors, with a proviso, "that if all and every the creditors should *refuse* to execute or otherwise consent to the deed within six months from the date thereof, it should be void;" some of the creditors did not execute the deed, but there was no evidence of their refusing so to do:—Held, that such non-execution was not a refusal within the meaning of the proviso, and did not make the deed void.

ASSUMPSIT for the use and occupation of a farm. Plea, non assumpsit, and issue thereon. At the trial before *Burrough*, J., at the last *Lent* assizes for *Hampshire*, the case was this. The plaintiff, in *June*, 1821, agreed to let to one *Edwards* a farm, called *Aston Farm*, at a yearly rent of 250*l.*, for a term of fourteen years, to commence at *Michaelmas* 1821, and determinable at the end of seven, or ten years, at the option of either party, upon giving one year's previous notice. *Edwards* entered into possession pursuant to the agreement, but on the 8th *November*, 1822, being then in distressed circumstances, he, by deed made between himself, of the first part; several persons, whose names were thereto subscribed as his creditors, of the second part; and one *Thomas Woodman* and the two defendants, also his creditors, of the third part; and reciting that *Edwards* was seised of freehold and leasehold hereditaments, and possessed of goods and chattels and personal estate and effects, and was indebted to his creditors in an amount which he was not able to pay; assigned to *Woodman* and the two defendants, all his freehold and leasehold property, and all other his personal estate and effects, whatsoever, in trust to sell either by public auction or by private contract, all his real and personal property, and to call in all monies, debts, &c., and, after defraying the expences of carrying the trust into execution, to divide the residue rateably and proportionably among such of the creditors as should execute the deed: "Provided, that if all and every the creditors of *Edwards*, whose debts respectively amounted to more than 5*l.*, *should refuse to execute or*

otherwise consent to the deed within six months from the date thereof, that then and in such case the same deed and every article, matter and thing, therein contained, should cease and become void to all intents and purposes." It appeared that *Edwards*, and the two defendants, executed the deed, but it was never executed by several of the creditors, nor by *Woodman*, the third trustee; though there was no proof that either he, or any one of the creditors had expressly refused to execute, or to consent to the deed. Mr. *Griffiths*, the attorney who prepared the deed, and who was a creditor to the amount of 15*l.*, said to one of the defendants at the time when he executed it, that it was void by means of the proviso. The defendants, immediately after executing the deed, went to the premises for the purpose of taking possession, when they found a sheriff's officer already in possession, under a writ of fieri facias at the suit of a creditor, and under a distress for rent, at the suit of the plaintiff. The defendants paid the debt of the execution creditor, and the plaintiff's rent up to *Michaelmas*, 1822, and on the 27th *November*, 1822, they sold all the live and dead stock upon the farm by public auction, and put a person into possession, who remained there by their authority up to *February*, 1823, when *Edwards* again took possession, and continued to manage the farm, the defendants paying the rent up to *Lady Day*, 1823. On the part of the plaintiff, an attempt was made to shew that *Edwards* kept possession of the farm, as the agent of the defendants, from *February* to *Michaelmas*, 1823, but the evidence upon that point was contradictory. It was then contended, that the defendants were liable to pay rent to the plaintiff, whether they remained in the actual occupation of the farm, or not, because the legal interest had vested in them by virtue of the assignment, and continued in them during the entire period in respect of which rent was claimed. On the part of the defendants it was argued, that the deed not having been executed by all the creditors, non-execution must be construed as a refusal to execute or consent to it,

1824. HOLMES v. LOVE.

and that it became void on the 9th *May*, 1823, being six months from its date, and consequently that the legal interest had been devested out of the defendants, before the rent claimed became due. The learned judge was of opinion, that the deed did become void on the 9th *May*, 1823, and, therefore, that the defendants were not liable for the rent claimed, unless they continued in the actual occupation of the farm after that day: and he accordingly directed the jury, if they thought that *Edwards* was in possession from *February*, 1823, as the agent of the defendants, to find for the plaintiff; and if they thought that he was in possession on his own account, to find for the defendants. The jury found for the defendants.

Selwyn, in *Easter* Term last, obtained a rule nisi for a new trial, upon the ground, that the mere omission to execute by some of the creditors did not avoid the deed, but that an express refusal to execute ought to have been proved; and

E. Lawes now shewed cause. The deed not having been executed by all the creditors within the time limited by the proviso expired at the end of that time, namely, on the 9th *May*, 1823, and which was before the rent claimed by this action accrued due. The non-execution of the deed was primâ facie evidence of an absolute refusal to execute or consent to it, and was all that was required to be proved; as in assumpsit for a simple contract debt, though the declaration always avers that the defendant refused to pay on request, evidence of a demand and refusal is never required when once a legal liability has been shewn, because the mere neglect to pay is sufficient evidence of a refusal to pay. It is impossible to hold that this deed is subsisting, without inferring that all the creditors consented to it, though they did not all execute it; and it is equally impossible to hold, that neglecting to sign a particular document, is evidence that the party consented to it: yet that is

the only evidence of consent here. There is, however, cogent evidence of an absolute refusal, in one instance; for Mr. *Griffiths*, when the defendant executed, told him that the deed was void, and such a declaration may fairly be taken to mean that the party had resolved not to execute; which amounts in substance to a refusal.

Selwyn and *Carter*, in support of the rule. The interest of *Edwards* in the premises vested by virtue of the assignment in the defendants, liable only to be devested upon a condition subsequent, namely, the execution of the deed by all the creditors. Now, that was a condition, the effect of which would be to defeat an estate previously vested, and must, therefore, according to all legal principles, be construed strictly. So construed, it is perfectly clear, that it was necessary to prove an absolute refusal by some or one of the creditors to execute or consent to the deed, in order to render it void; and as no such proof was given, the deed enures, and the plaintiff is entitled to maintain this action.

BAYLEY, J.—This being an action for use and occupation, the plaintiff is not entitled to recover, unless he has shewn that the defendants, either actually occupied the premises, or possessed the legal interest in them, during the whole of the period, in respect of which he claims rent. Now the jury have found, in point of fact, that the defendants were not in the actual occupation, and we are to say, in point of law, whether they had the legal interest. *Edwards*, the tenant, assigned his interest in the farm to the defendants in *November*, 1822, and they then took possession under the deed of assignment, which contained a proviso, that if all and every the creditors of *Edwards*, whose debts respectively amounted to more than 5*l*., should *refuse* to execute or otherwise consent to the deed within six months from the date thereof, the deed should be *void*:

1824. HOLMES v. LOVE.

and it is said the deed is void, because some of the creditors did not execute or otherwise consent to it. But the proviso does not make the deed void in case any of the creditors *omit* to execute or consent, but only in case any of them *refuse* so to do, and the question is whether any of them have so refused. There certainly is no evidence of any such refusal, and yet that was a matter easily susceptible of proof if it really occurred, for whoever was the person that carried the deed round to the creditors for the purpose of obtaining their signatures, must have known, and might have been called to prove the fact. It has been contended that the declaration made by Mr. *Griffiths* to one of the defendants, shewed that the deed was void; but his saying that it was void, is not evidence of its being so, or of a refusal to execute it. The deed undoubtedly had the effect of vesting the whole legal interest of *Edwards* in the assignees, and as there is no evidence of the refusal of any one creditor to execute or otherwise consent to the deed, it has never been devested out of them, and therefore they are legally responsible for the rent now claimed. It is satisfactory to add, that the justice of this case goes hand in hand with the law, for as the defendants have had the benefit of the occupation of the farm, honesty requires that they should pay the landlord his rent. The rule for a new trial, therefore, must be made absolute.

HOLROYD, J.—I am of the same opinion. It is quite clear in point of law, that the interest in the premises became vested in the defendants by the deed of assignment; and it has never been devested out of them, at least there is no evidence to shew that it has, because there is no evidence of a refusal by any creditor to execute or consent to the deed. In the absence, therefore, of such evidence, the interest remains in them by virtue of the original assignment, and they are liable to the plaintiff for the amount of the rent.

1824.
HOLMES v. LOVE.

LITTLEDALE, J.—I am clearly of opinion that this action was maintainable, and that the plaintiff was entitled to a verdict. The deed of assignment vested in the defendants all the tenant's interest in the premises, with a proviso, that the estate so conveyed should become void, in case any of the creditors refused to execute or consent to the deed. That was a condition, the effect of which would be to defeat a vested estate, and, therefore, it must be construed strictly. For this we have the highest authority; for my Lord Coke, speaking on this subject, says (*a*) "A condition that is to create an estate is to be performed by construction of law, as near the condition as may be, and according to the intent and meaning of the condition; albeit, the letter and words of the condition cannot be performed. But otherwise it is of a condition that destroys an estate, for that is to be taken strictly, unless it be in certain special cases." Construing the condition in this case by that rule, it seems to me that the mere non-execution of the deed is not a refusal to execute within the strict meaning of the proviso. It is true, that in an action of indebitatus assumpsit, the mere omission to pay is evidence to support the averment of refusal to pay, but that is because the debt has previously become absolute by the non-payment of the money at the time when it first became due. So when the condition of a bond is that it shall be void if a certain sum of money is paid on a particular day, the non-payment of the money on that day is a breach of the condition, and gives the obligee a right to put the bond in suit. *Exparte Rowlatt* (*b*). But, where "a bond was conditioned, for the payment of a sum of money, to the executors of the obligor, and of the interest during his life, payable on certain days, *or within twenty days after demand;* and the obligee became bankrupt, and the interest was then due, ***but no demand had been made;***" it was held that there was no forfeiture of the bond so as to give the obligee a right to put the bond in suit.

(*a*) 1 Inst. 219. *b*.

(*b*) 2 Rose, 416.

1824.

HOLMES v. LOVE.

Winter v. *Manseley* (*a*). So, in this case, the deed could not be defeated, except by an express refusal by one of the creditors to sign, and as no such refusal was proved, the interest remained vested in the defendants, and they remained liable to the plaintiff for the amount of rent claimed by his action.

Rule absolute.

(*a*) 2 B. and A. 802.

WALMSLEY v. ABBOTT.

An apothecary is not bound by statute 55 G. 3. c. 194. to prove the hand-writing of every member of the court of examiners of the apothecary's company, who may have subscribed his certificate. Therefore, where the plaintiff, in an action for his bill, produced a certificate, purporting to be granted by the court of examiners, and having twelve signatures, purporting to be the signatures of its members, and proved one of the signatures, and gave general evidence to shew that the certificate was genuine, and that he obtained it from the court of examiners:—Held, that such certificate was admissible in evidence, and would support the action.

ASSUMPSIT for an apothecary's bill. Plea, non-assumpsit, and issue thereon. At the trial before *Garrow*, B. at the last *Lent* assizes for *Shropshire*, the plaintiff produced a certificate with twelve signatures, purporting to be the signatures of the persons composing the court of examiners of the Apothecaries' Company, and one other signature, purporting to be the signature of the person acting as their secretary. The first witness satisfactorily proved the hand-writing of one of the examiners, and that of the secretary, as the attesting witness; and stated that one other person, whose name appeared to be affixed to the certificate, was also an examiner, but that he was not acquainted with his hand-writing. He added, that he had seen several certificates granted by the court of examiners, and that he firmly believed the one produced to be a genuine instrument. A second witness proved, that he was examined and passed at Apothecaries' Hall, on the same day that the plaintiff was examined and passed, and that he received a certificate precisely similar in all its parts to that produced by the plaintiff, which he also believed to be genuine. The amount of the plaintiff's bill was not disputed, but it was objected on the part of the defendant, that by sections 9 and 21 of the Apothecaries' Act, 55 G. 3. c. 194. the plaintiff was bound to prove the hands-writing of, at least, the

majority of the examiners to his certificate, and that, as that had not been done, the certificate produced could not be received in evidence. The learned judge overruled the objection, and received the evidence, but gave the defendant leave to move to enter a nonsuit, and the plaintiff had a verdict for 10*l.* 10*s.*

W. E. Taunton, in *Easter* term last, having obtained a rule nisi for entering a nonsuit,

Whately, (with whom was *Russell,*) now shewed cause. The question is, whether the evidence adduced at the trial was sufficient to enable the plaintiff to recover the amount of his bill, as a certificated apothecary; and that will depend upon the construction to be given to the Apothecaries' Act, 55 Geo. 3. c. 194. sections 9, 14, and 21. The ninth section of the statute enacts, "that twelve persons, properly qualified, shall be appointed as a court of examiners, and that they, or the major part of them, shall examine all persons desirous of practising as apothecaries, and grant or withhold certificates as they shall think fit." The fourteenth section enacts, "that from and after the first day of *August,* 1815, it shall not be lawful for any person or persons (except persons already in practice as such) to practise as an apothecary, unless he or they shall have been examined by the said court of examiners, or the major part of them, and shall have received a certificate from the said court of examiners, or the major part of them, as aforesaid." The twenty-first section enacts "that no apothecary shall be allowed to recover any charge claimed by him, in any court of law, unless such apothecary shall prove on the trial that he was in practice as an apothecary, prior to or on the said first day of *August,* 1815, or that he has obtained a certificate to practise as an apothecary, from the said master, wardens, and society of apothecaries, as aforesaid." Now, it is by no means necessary to the object of this statute, nor does it in any part in

1824.

Walmsley v. Abbott.

terms require, that the certificate shall be signed by the court of examiners, or the majority of them; they are only to grant the certificate, and therefore the duty of the plaintiff extended no further, than to offer reasonable evidence that the certificate he produced was a genuine instrument. There is nothing to take this case out of the general rule, that all the signatures to a document need not be proved, if enough are proved to warrant a belief that it is genuine; and here two were proved, which were sufficient for that purpose. As the court of examiners are only to grant the certificate, and as the candidate is to receive it from the master, wardens, and society, it would have been valid without the signatures of any of the examiners; and it would be matter of extreme hardship to throw upon the plaintiff the very difficult task of proving the hands-writing of no less than seven persons, none of whose names were necessary to give validity to the document. In any view of the case, the examiners are not parties to the instrument, they are, at the utmost, witnesses that it is genuine; and therefore when the plaintiff had proved the hand-writing of one of them, and that of the secretary, he had clearly done enough to render the certificate admissible, as evidence for the jury. If the instrument in question is not genuine, the plaintiff and the persons who are proved to have signed it, must necessarily have been guilty of a very gross fraud, if not of the crime of forgery, and surely the court will not presume, against all appearances and probabilities, the perpetration of so flagrant an act. *Moises* v. *Thornton* (a) will be cited on the other side, but is very distinguishable from the present case; for there the plaintiff averred that he had taken the degree of doctor of physic, and produced a diploma from the university of *St. Andrew's* in support of that averment; but being unable to prove the seal of the university, he of course failed in shewing that the diploma was genuine, and therefore was not allowed to make it evidence. The only question here is whether there was sufficient primâ facie evidence of the certifi-

(a) 8 T. R. 303. Vide Phil. Ev. vol. 2. 104.

cate being a genuine instrument; if there was, that is enough to entitle the plaintiff to recover. It would be a grievous hardship upon apothecaries living in distant parts of the country, if they were obliged to prove the unnecessary signatures of persons, who must be considered as mere witnesses to the act of an authorized officer, before they can sue. Indeed if such strictness of proof was required, it would be impossible in many cases for an apothecary ever to recover his bill.

W. E. Taunton contrà. The argument that the operation of this statute may be attended with hardship in particular cases cannot have any weight with the court; they are to enforce a general law according to its construction, and that may be done in the present case without imputing any fraud to the plaintiff. This case has been truly represented to depend upon the three sections of the statute which have been already brought before the notice of the Court. The ninth section describes the mode by which certificates are to be granted, namely, by the court of examiners, *or the major part of them*. The fourteenth and twenty-first sections plainly refer to that mode, because they speak of a certificate to be granted *as aforesaid*. Consequently, it was not sufficient for the plaintiff to shew that a certificate was granted to him; he ought to have shewn that it was granted by the court of examiners, or the major part of them. It is said that the signature of the secretary was proved, and amounted to primâ facie evidence, that the document was genuine; but that signature was a nullity, for the act of parliament makes no mention of any such officer, and therefore his subscribing the certificate cannot contribute to its authenticity. The only mode by which the plaintiff could shew that the certificate was granted by the majority of the examiners, was to prove the hands-writing of some of them, and that they were the then acting examiners. *Moises* v. *Thornton* was a much stronger case in favour of the plaintiff than the present, for there a witness

1824.

WALMSLEY v. ABBOTT.

was called who proved that he had gone to the University of *St Andrew's*, and had actually seen the proper officer sign a certificate (which he produced) that a diploma had been regularly granted: and yet such evidence was held insufficient. [*Bayley*, J. The certificate there produced was not, nor did it purport to be the diploma, nor was the diploma itself authenticated; in those respects that case differs from the present.] Neither is the certificate here the certificate described in the act; nor is it authenticated, for the secretary who could alone have proved its due execution was not called as a witness.

BAYLEY, J.—I think this rule must be discharged. The ninth section of the statute declares that from and after a day therein named, no persons shall begin to practise as apothecaries, unless they have been examined by certain persons appointed by the Apothecaries' Company, and gives power to those examiners, or the majority of them, to grant or refuse certificates at their discretion; the fourteenth declares that no persons shall begin to practise, unless they have *received* such a certificate: and the twenty-first declares that no such persons shall recover their charges in a court of law, unless they prove that they have *obtained* such a certificate. Now, construing these enactments with reference to each other, and putting a fair and reasonable construction upon them, I think they do not make it incumbent on a plaintiff in an action like this, to prove the handswriting of all the individuals whose names appear affixed to his certificate, but only to prove that the certificate did come out of the hands of the court of examiners, and that he did obtain and receive it from them, as a genuine certificate. Of all this I think there was abundant evidence in this case, for it was proved that two of the persons whose names appeared upon the certificate were members of the court of examiners, and that the signatures of one of them and of the secretary were genuine; and though the statute does not require that the court shall have such an officer, or that he shall sign

the certificate, still in point of fact there is such an officer, and he did sign the certificate, and thereby authenticated it as a genuine document. It was further proved by one of the witnesses that the plaintiff was examined, and that the witness was examined on the same day, and received a certificate precisely similar to that produced by the plaintiff. Upon this body of evidence it seems to me impossible to doubt that the document in question was issued by those who were authorized to issue it, as and for a genuine certificate, and that the plaintiff received it from them as such: and, therefore, I think the plaintiff proved quite enough, and did all that the statute requires to enable him to maintain his action.

1824.

WALMSLEY v. ABBOTT.

HOLROYD, J. concurred.

LITTLEDALE, J.—If every apothecary were obliged to prove the hand-writing of all the persons whose names appear upon his certificate, very few would be able to support their just and legal claim to remuneration for their professional services, and great hardship and injustice would be the result. The proof of one signature to the certificate was sufficient in the first instance to give it authenticity, for it is impossible to presume that fraud has been practised on such an occasion, or that some, or one of the examiners signed for the rest. I think there was conclusive evidence here that the certificate was genuine, but at any rate there was a primâ facie case to go to the jury, and as they were satisfied, we have no right to impugn their verdict.

Rule discharged. (a)

(a) See *Cooke* v. *Loveland*, 2 Bos. and Pul. 31. *Grindley* v. *Barker*, 1 Id. 229. *Rex* v. *Toncroft*, Burr. 1017. 1 Bulst. 105: and *Exparte White*, ante, vol. i. 151.

1824.

Facey *v.* Hurdon.

Declaration in case for not carrying away the tithe of corn, alleging it to have been "lawfully and in due manner" set out, is sustained by proof, that the tithe was set out according to an agreement between the parties, though not according to the mode prescribed by the common law. Whether the crop has been left on the ground a reasonable time after the tithe has been set out, for the tithe-owner to compare his tenth part with the residue, is a question of fact for the jury, and not of law for the judge.

DECLARATION in case, for not carrying away tithes, stated, that defendant, in the year 1823, was farmer of the tithes of corn growing on a certain close in the parish of *Egloskerry*, in the county of *Cornwall*, and that plaintiff was the occupier of the said close, which was in that year sown with barley; that plaintiff, on &c. at &c. cut down the barley growing on the said close, and then and there, *lawfully and in due manner*, divided, separated, and set out thereon, the tenth part or tithe of the same from the nine parts, residue thereof, and there left the same for the use of defendant, and afterwards, to wit, on &c. at &c. gave notice thereof to defendant; but that defendant did not, nor would, in a convenient and reasonable time after, take or carry away the same, or any part thereof; whereby &c. At the trial before *Bosanquet*, Sergeant, at the last *Lent* Assizes, for the county of *Cornwall*, the facts were these. The plaintiff had been in the occupation of the premises described in the declaration several years, and the defendant had been, also several years, the farmer of the tithes of corn in the parish. On the 19th *September*, 1823, the plaintiff, having put all his corn into shocks, consisting of twelve sheaves each, sent notice to the defendant, who lived at a distance of about one mile and a half, that he intended to tithe the corn on the following morning. The plaintiff did accordingly tithe the corn the next morning, setting out every tenth shock, and about seven o'clock he began to carry the other nine parts; up to that hour the defendant had not been on the farm, but one of the persons who had assisted in setting out the tithe, met the defendant about nine o'clock, and was told by him that he was then coming to tithe the corn. The witness answered that the corn had been tithed already, and that the plaintiff was then carrying it, upon which the defendant inquired how many dozens, meaning shocks, there were, but did not at that time make any complaint of being prevented from comparing the tithe shocks with the rest. The defendant had taken

1824.

FACEY v. HURDON.

the tithe of the plaintiff's farm in kind during the last four years, and during all that time the corn had regularly been set out in shocks, or dozens, and not in single sheaves. It was contended on the part of the defendant, that by the common law the tithe must be set out in single sheaves, and not in shocks, and therefore that the plaintiff had not proved his allegation, that the tithe was "lawfully and in due manner set out," and must be nonsuited. The learned Judge was of opinion, that if it was set out in shocks in consequence of an agreement to that effect between the parties, it was sufficient; but reserved the point, giving the defendant leave to move to enter a nonsuit. It was then contended, that there was no evidence to go to the jury of any such agreement, and that even if there were, still that the agreement must have been a conditional one only, and subject under any circumstances to the corn remaining a convenient and reasonable time on the land, for the purpose of the defendant's comparing the tithe shocks with the rest. The learned Sergeant thought that the question of reasonable time was for the jury, and accordingly left it to them to say, first, whether there was an agreement between the parties that the tithe should be set out in shocks, and second, whether the whole of the crop had remained upon the land a reasonable time for the inspection of the defendant. The jury found a verdict for the plaintiff, damages 40s, and

Erskine, in *Easter* term last, having obtained a rule nisi either for a nonsuit or a new trial,

Coleridge now appeared to shew cause, but the Court stopt him and called upon,

Erskine and *Carter*, in support of the rule. The plaintiff has alleged in general terms that he set out the tithe "lawfully and in due manner," and therefore he was bound to prove that he set it out according to the requisites of the common law. Now that, as was said by Lord *Ellenborough*,

1824. FACEY v. HURDON.

in the case of *Shallcross* v. *Jowle* (*a*), requires that the corn shall "be tithed in the first convenient state in which the tithe can be collected, after the corn is cut, which is in sheaves." The parties, indeed, may agree that the tithe shall be set out after some other mode; but if the plaintiff intended to rely upon any such agreement here, he should have treated that as the ground of his action, and should have set it out in his declaration, and proved it in evidence, none of which things he has done. The defendant, therefore, has been misled and taken by surprise by the plaintiff's mode of declaring, and is at least entitled to a new trial. Then, secondly, even if there was an agreement, it must have been subject to a condition, that the crop should remain on the land a sufficient time, to give the defendant an opportunity of comparing the tithe shock with the other nine; for as was added by Lord *Ellenborough* in the case already cited, "if the farmer adopts any mode of tithing which excludes or abridges the due means of the parson's comparing the tenth sheaf with the other nine, it is bad:" and the reasonableness of the time in such a case is a question of law, and not of fact, and should have been so decided by the judge, instead of being left to the jury. *Co. Litt.* 56. b.; *Bayley* on Bills, 187. (*b*)

BAYLEY, J.—I am of opinion that there is no ground for disturbing the verdict in this case. It is perfectly true, that by the common law the tithe ought to be set out in sheaves; but, modus et conventio vincunt legem, and, therefore, if the tithe was set out in shocks in consequence of an agreement, or understanding to that effect between the parties, the plaintiff was justified in alleging that he had set it out "lawfully and in due manner." With respect to the other objections, the only question for us to consider is, whether the learned judge in any degree misdirected the jury, because, as the damages recovered were under 20*l*, we cannot grant a new trial upon the ground that the verdict is against the

(*a*) 13 East. 261.

(*b*) Vide *Chitty* on Bills, 211. 345. 402. and the cases there collected.

weight of evidence. Two questions were left to the jury, first, whether there was an agreement to set out the tithe in shocks, and second, whether the corn remained a reasonable time on the ground. As to the first, there is no doubt that there was sufficient evidence of such an agreement to go to the jury, and as they have disposed of that question, we cannot impeach their finding; as to the second it is said, that it was for the learned judge to decide, in point of law, whether the time that elapsed between the setting out the tithe and the carrying of the crop, was or was not reasonable. In some cases, undoubtedly, the question, what is a reasonable time is matter of law for the judge to decide, as in the instance cited by my Lord *Coke*, and the more modern case of the giving notice of the dishonour of a bill of exchange or promissory note. But the present is not one of those cases. Here the question depended upon a variety of circumstances, which were peculiarly appropriate for the consideration of the jury; namely, the distance at which the parties lived from each other, the time when notice was given that the corn would be tithed, the state of the weather, and other similar matters. That being the case, I think both these questions were most properly left by the learned judge to the jury, and consequently that this rule ought to be discharged.

HOLROYD, J.—I also think that this verdict ought not to be disturbed: it seems to me that the evidence produced at the trial supported the allegation that the tithe was "lawfully and in due manner" set out. In cases where the parties enter into no agreement, the common law certainly does direct that the tithe shall be set out in sheaves, but the direction of the common law may be dispensed with by the adoption of an agreement to set out in some other mode, and I think it was so dispensed with in this case: and, therefore, that there is no variance between the evidence and the record, although the agreement is not set out in the declaration, which I think was not necessary. It was in

1824.
Facey v. Hurdon.

proof that the defendant had taken the tithe, set out in the same manner, during four successive years, which was of itself, perhaps, sufficient evidence of an agreement so to take it; but the proof did not stop there, for upon being told that the corn was set out, the defendant inquired how many dozens, or shocks there were, shewing to demonstration that he knew the tithe was to be set out in shocks. In this respect this case differs materially from *Shallcross* v. *Jowle*, for in that there was no direct evidence at all of an actual agreement. Then with respect to the reasonableness of time in this case, that was clearly a question for the jury, and there was, in my opinion, abundant evidence to warrant them in finding as they did. On both points, therefore, I think this rule must be discharged.

Littledale, J.—I think the verdict is right. This action arises out of the particular relative situation of the parties, each of whom has a duty to perform, imposed upon him by the law; the landholder that of setting out the tithe, and leaving both that and the residue of the crop for a reasonable time on the ground; and the tithe-owner that of carrying the tithe away when such reasonable time has elapsed. The mode of setting out tithes may be, either that prescribed by the common law, namely, in sheaves, or any other which is established by custom, or adopted by agreement between the parties. Now in an action against the tithe-owner for a neglect of his duty, it is not necessary to state in what mode the tithe was set out; and, therefore, in the present case, it was sufficient to aver that it was set out "lawfully and in due manner," because that averment will apply equally to the common law mode, a mode established by custom, and a mode adopted by agreement; and there was undoubtedly in this case evidence of an agreement, sufficient to go to the jury; and, therefore, properly left to them, and sufficient to support the declaration. I also agree that the question of reasonable time was, in this case, one peculiarly for the jury, and was properly left to them.

Sometimes this is a mixed question of law and of fact, and then the legal question must be decided by the judge, when the facts bearing upon it have been ascertained by the jury; as in the case of *Darbishire* v. *Parker* (*a*). Here, however, I think it was precisely a question of fact, which the judge had no authority to decide himself, but was bound to leave to the jury. As, therefore, there is no misdirection in this case, there is no ground either for entering a nonsuit or for granting a new trial.

Rule discharged.

(*a*) 6 East, 3.

SIR WILLIAM CURTIS, Bart. and another, *v.* The Inhabitants of the Hundred of GODLEY.

An action will not lie against the hundred upon the 9 G. 1. c. 22. for the unlawful and malicious destruction of a plantation of trees by fire, unless the act done proceeds from a malicious motive towards the owner of the property. Therefore, where a fire, supposed to have been wilfully made, had commenced in another person's plantation at the distance of a mile from the plaintiff's wood, and by communication, the flames destroyed his property:—Held, that the case did not come within the Black Act, so as to entitle him to sue the hundred.

DEBT, on the statute 9 G. 1. c. 22., against the defendants, inhabitants of the Hundred of *Godley*, in the county of *Surrey*, to recover damages for an injury sustained by the plaintiffs, in having had a quantity of fir trees, growing for profit, wilfully, maliciously, and feloniously destroyed by fire by some person or persons unknown. Plea, the general issue, and issue thereon. At the trial before *Alexander*, C. B. at the last *Lent* assizes for the county of *Surrey*, the evidence in support of the action was this:—On the 6th of *May*, 1823, a large plantation of firs, growing on Bagshot Heath, belonging to the plaintiffs, and which was situate at a distance of a mile from any dwelling house, was destroyed by fire. The fire first broke out in the day time, in an adjoining plantation, belonging to a Mr. *Laurel*, and burned through that plantation for the length of a mile, previous to its communicating to the plantation of the plaintiffs. The spot where the fire was first seen was distant

1824.
Curtis v. Godley.

half a mile from any dwelling house, and from any public road, and near it were found some remains of sear wood, which appeared to have been collected and used for the purpose of kindling a fire. Upon this evidence, it was contended that there was no case to go to the jury, from which they could presume that the fire was wilfully and maliciously kindled. The probability was, that the fire was either accidental, or occasioned by some mischievous boys, in which case the hundred would not be answerable. Two objections, after mentioned, were also taken as to the liability of the hundred in point of law for the injury in question, supposing it to have been wilful and malicious. The Lord Chief Baron reserved those points, with liberty to the defendant to move to enter a nonsuit, in the event of a verdict being found for the plaintiffs; and his lordship then directed the jury to find for the plaintiffs, if they were satisfied that the fire had been kindled wilfully and maliciously, but, if they thought it arose from accident, to find for the defendants. The jury found for the defendants.

Marryat, in *Easter* Term last, obtained a rule for a new trial, on the ground that the verdict was contrary to the evidence.

Bolland shewed cause. The jury were, upon the evidence, justified in finding that this was an accidental and not a wilful and malicious fire. There was no proof to satisfy the averment in the declaration, that the plantation was wilfully, maliciously, and feloniously destroyed. The hundred is not liable for accidents arising from the wantonness of boys, or the carelessness of wayfaring persons, who may happen to kindle a fire for culinary purposes, in an open place like *Bagshot Heath*. Some satisfactory evidence was necessary to shew that the fire was occasioned by the commission of a felonious act. Positive evidence to that intent may not be necessary, but some cogent proof of an

unlawful intention must be adduced, so as to subject the hundred to liability. Here the evidence was too slight, and the jury did right in finding for the defendants. But there are two fatal objections to the plaintiffs' right to recover against the hundred in point of law. First, that the wilful destruction of a plantation of trees of this description by *fire* is no offence within the Black Act, 9 G. 1. c. 22. upon which the action is founded; and second, that if it be an offence to destroy trees of this description, the remedy given by law is against the parish, town, or vill, and not against the hundred. As to the first objection, it is fatal in two points of view. The words of the Black Act are that "if any person or persons shall unlawfully and maliciously kill, maim, or wound any cattle, or cut down, *or otherwise destroy*, any trees planted in any avenue, or growing in any garden, orchard, *or plantation*, for ornament, shelter, *or profit*, &c." Now to destroy trees *by fire* is no offence within this act, because the words "or otherwise destroy," must mean a destruction ejusdem generis with "cutting down." Then it is obvious from the language of the statute, that the trees must be such as are growing *contiguous to a dwelling house*, which was not the case in this instance. Secondly, the action, if at all maintainable, must be laid against the *parish, town, or vill*, according to the provisions of the statutes 1 *Geo.* 1. c. 2. and 6 *Geo.* 1. c. 16. It is true that the 22 *Geo.* 1. c. 36. s. 8. gives an action against the inhabitants of the hundred, or of the parish, town, or vill, at the option of the party injured; but this is only in those cases where the act done would be an offence within the 9 *Geo.* 1. c. 22. Here the act done is not an offence within that statute, and, therefore, the hundred is clearly not liable.

Marryat and *Chitty*, in support of the rule. In order to maintain an action against the hundred, it is not necessary to give distinct and positive evidence, that the injury was done wilfully and maliciously. It is sufficient to

1824.

CURTIS v. GODLEY.

adduce such evidence as may reasonably induce the jury to believe that it did not arise from accidental causes. *Reed* v. *The Inhabitants of Gainsbury* (*a*). Such evidence was here given, and, therefore, the verdict is erroneous. Then as to the objections that this is not an offence within the meaning of the Black Act, and that if it be a malicious injury the remedy must be against the parish, town, or vill; they arise from too narrow a construction of the statute in the first instance, and from a misapprehension of the law in the other. The words "otherwise destroy," in the Black Act, mean a destruction by any mode whatever, and cannot be construed to mean a destruction by cutting only. To maintain that interpretation of the statute, it must be said, that to burn down a plantation of 150 acres of trees would not be to destroy them; but this would be too narrow a construction of a remedial statute, which this has been decided to be. Then was this a plantation within the meaning of the statute? The words are "any trees planted in any avenue, or growing in any garden, orchard, *or plantation;* for ornament, shelter, *or profit.*" Now this was a plantation of trees growing for profit, and clearly comes within the words of the statute. If it did not, there would be no protection given by the law to this species of property, which is of great importance as it respects the useful application of waste land, which could be applied to no other purposes. This, therefore, being a case within the Black Act, the hundred is liable, and the plaintiffs were not bound to proceed against the parish, town, or vill.

BAYLEY, J.—The verdict for the defendants must have proceeded on the ground that there was no evidence to convince the minds of the jury that this plantation was wilfully set on fire. I take it to be quite clear that a plaintiff bringing an action on the 9 *Geo.* 1. c. 22. must make out to the satisfaction of the jury that the place was wil-

(*a*) Ante, vol. iv. 250.

1824.
CURTIS
v.
GODLEY.

fully set on fire before he can recover against the hundred. If this case should go to a new trial the proper direction to the jury would be, that if they are convinced, in their own minds, by the evidence, that the plantation was wilfully set on fire, then they ought to find for the plaintiffs; but if upon a review of the whole evidence, considering the time of day when the fire occurred, the situation of the place, and its liability to accidental fire, they should entertain a reasonable degree of doubt, then they ought to find for the defendants. Upon the balance of the evidence, it seems to me that it would not be improper, that the case should, upon payment of costs, undergo the revision of another jury, provided upon carefully looking through the acts of parliament, we should be satisfied that this is a case to which the 9 *Geo.* 1. c. 22. applies; and it being a question of great and general importance we shall take time to consider of it.

Cur. adv. vult.

On a subsequent day the judgment of the Court was delivered by

BAYLEY, J.—We have looked into the different acts of parliament bearing on this case, and we are of opinion, that this action is not maintainable against the hundred; but our judgment is founded upon a view of the 9 *Geo.* 1. which was not brought to our notice during the argument. The question is, whether the destruction of this plantation by fire, assuming it to have been done wilfully, would be any offence within the meaning of that statute, so as to give a remedy against the hundred; and we are of opinion that it would not. Before I state the reasons for that conclusion, I shall advert to the other statutes referred to in argument, as giving a remedy against the inhabitants of the parish, town, or vill. The 1 *Geo.* 1. st. 2. c. 48. entitled "An act to encourage the planting of timber trees, fruit trees, and other trees, for ornament, shelter, or profit; and for the better preservation of

1824. Curtis v. Godley.

the same; and for the preventing the burning of woods;" enacts that if any person shall maliciously break down, cut up, pluck up, throw down, bark, or otherwise destroy, deface, or spoil, any timber tree, fruit tree, or any other tree, the party injured shall recover satisfaction and recompense from the inhabitants of the parish, town, hamlet, vill, or place, where the injury shall have been committed. The 6 *Geo.* 1. c. 16. recites that doubts had arisen whether the previous act extended to offences committed in the day time, and gives a remedy against the inhabitants of the parish, town, &c. adjoining the wood, &c. whether the damage be done by day or by night. The 29 *Geo.* 2. c. 36. s. 9. recites that by the 9 *Geo.* 1. c. 22. it was enacted that the inhabitants of the hundred should make satisfaction and amends to every person for damage sustained by the cutting down or destroying any trees, which should be done or committed by any offender against that act, to be recovered in manner therein directed; and recites also that doubts had arisen whether the provision made by that act had not repealed and annulled the remedy given by the 1 and the 6 *Geo.* 1. respectively; and for obviating such doubts, proceeds to enact, that "it shall and may be lawful for any person, &c. to take remedy for the before mentioned damages, either against the parish, town, hamlet, vill, or place, where any of the *said offences* shall be committed, according to the powers given by the said acts, or on the hundred wherein any of the *said offences* shall be committed, as to such person, &c. shall seem most meet." It is obvious that the words "said offences," refer to the offences created by the 9 *Geo.* 1. c. 22. The 13 *Geo.* 3. and subsequent statutes give no remedy against the hundred; and, therefore, these acts give the remedy against the inhabitants of the parish, town, or vill. The remedy against the hundred being given by the 9 *Geo.* 1. c. 22. only, and the 29 *Geo.* 3. c. 36, giving an option to the party injured to bring his action either against the parish, &c. in cases where the person doing the act is an offender against the Black Act,

1824.

CURTIS *v.* GODLEY.

the question for our consideration is whether the person or persons who did the act, whereby the plaintiffs in this case have been dammified, were offenders against that statute. The words of the 9 Geo. 1. c. 22. s. 1. are, that if any person "shall unlawfully and maliciously kill, maim, or wound any cattle, or cut down, or otherwise destroy, any trees planted in any avenue or growing in any garden, orchard, or plantation, for ornament, shelter, or profit, he shall upon conviction be adjudged guilty of felony." Now in order to constitute an offence within this clause, it is essential that the act should be done unlawfully and maliciously; and the term "maliciously," in this part of the statute, means, according to a great many decided cases, *malice against the owner* of the property injured. I shall advert to some cases in which this construction was put upon both branches of this part of the clause. In *Rex* v. *Pearce*, tried before Mr. Justice *Heath*, at *Gloucester*, in 1789, and in *Rex* v. *Kean*, at the Old Bailey, in the same year, it was ruled, that in order to support an indictment for maiming cattle it was necessary to shew that the act was done from malice against the owner of the cattle, and not from any angry or passionate disposition towards the animal itself. In *Shepherd*'s case (*a*), the same point was ruled by Mr. Baron *Hotham* and Mr. Justice *Heath*; and in all these cases the prisoners were acquitted. There have, however, been later decisions than those I have mentioned. In *Rex* v. *Austin*, which was determined before the twelve Judges in *Michaelmas* Term, 1822, the same point was decided. In that case, the prisoner was indicted for killing, maiming, and wounding a sheep of one *Mary Clare*. It appeared in evidence that the prisoner acted from malice, not against *Mary Clare*, but against Joseph her son, who managed the business of her farm; after conviction the twelve Judges held, that the conviction could not be supported, inasmuch as *Joseph Clare* could not in any respect be considered as owner of the sheep. These decisions took place on the first branch of the clause as to

(*a*) 2 Leach, 609.

1824.
CURTIS v. GODLEY.

the maiming of cattle; but the words "unlawfully and maliciously" are referable to both branches of it, and must receive the like construction. Mr. *East*, in his Pleas of the Crown (*a*), comments on this statute, and also upon the 6 *Geo.* 3. c. 36. and c. 48. and after noticing several points in which they differ, makes these observations:—"the most important distinction of all, is the view and intent of the Black Act contrasted with the other statutes. Supposing that the words "wilfully and maliciously," which occur in the preamble of the statute 6 *Geo.* 3. c. 36. of which the first only is used in the enacting part of the 6 *Geo.* 3. c. 48. are a descriptive part of the offence under those statutes, yet the whole scope of those statutes, which were intended for the protection of the property itself from depredation, shews that the word "maliciously" is only to be taken in its most general signification, as denoting an unlawful and bad act, an act done malo animo, from an unjust desire of gain, or a careless indifference of mischief. Whereas in order to bring an offender within the penalty of death under the Black Act, the malice must be personal against the owner of the property. This has been expressly holden with respect to the offence of killing, maiming, or wounding cattle, and the two offences are described in the same paragraph of the clause, and must therefore have the same construction." Since the publication of Mr. *East*'s work, the question upon the latter branch of the clause has come under the consideration of the Judges in *Rex* v. *Taylor*, in *Hilary* Term, 1819. There a person named *Knevett*, a nurseryman in the county of *Surrey*, had many young apple and pear trees growing in his garden, from four to six feet high. It appeared that the prisoner, acting from malice towards *Knevett*, cut down about 100 of the trees and left them on the ground. Several of them were cut below the grass, and might shoot again and be regrafted, and would bear again in five or six years. It was found by the jury as a fact that although the trees were cut down, yet they were not totally

(*a*) 2 East, P. C. 1062.

1824.

CURTIS v. GODLEY.

destroyed, and upon this finding the Judges were unanimously of opinion that these were trees within the act, inasmuch as they were growing for profit, and that cutting them down without total destruction was sufficient to bring the case within its operation; and they held that the 9 *Geo.* 1. c. 22. was not repealed by the 6 *Geo.* 3. c. 36. and c. 48. because those statutes applied to cases where there was no malice against the owner of the property, and they determined the conviction to be right. In that case it was also made a question whether the destruction of trees in gardens, orchards, and plantations continued an offence under the 9 *Geo.* 1. c. 22. notwithstanding the subsequent provisions in the 6 *Geo.* 3. c. 36. and c. 48. and the Judges were of opinion that it did, because to bring a case within the Black Act, malice against the owner of the trees was essential, whereas the other statutes applied to cases where no such malice existed. In order therefore to enable a party to maintain an action against the hundred, under the Black Act for the destruction of trees, it ought to appear that the offender acted from malice against the owner. Now the facts in this case clearly take it out of the statute in that view. Here it appears, that the fire was kindled, not upon the plaintiff's ground, and if kindled at all by design, it was upon the land of Mr. *Laurel*, at a considerable distance from the plaintiff's property, and therefore, we think that although there might be some reason for saying that the offender acted from malice towards Mr. *Laurel*, yet it cannot with propriety be said that he acted from malice againt the plaintiff, and consequently this action is not maintainable against the hundred, the offence, if any, not being within the 9 *Geo.* 1. c. 22. It follows therefore that the rule nisi for a new trial must be discharged.

Rule discharged.

1824.

BLOXSOME *v.* WILLIAMS.

Where a parol contract was entered into for the purchase of a horse above the value of 10*l.* on a *Sunday*, with a warranty of soundness, and the horse was not delivered and paid for until the *Tuesday* following:—Held, first, that the contract was not complete until the latter day, and, second, that supposing it to be void within the 29 Car. 2. c. 7. s. 2. still it was not an available objection on the part of the vendor, in an action for the breach of the warranty, the vendee being ignorant of the fact that the former was exercising his ordinary calling on the sabbath-day.

THIS was an action of assumpsit on the warranty of a horse, with the common money counts. Plea, the general issue. At the trial before *Park*, J. at the *Lent* assizes for *Berkshire*, 1823, the facts proved in evidence were these:—The defendant was a coach-master, and also a dealer in horses. The plaintiff's son was travelling on a *Sunday* by the defendant's coach, and during a stoppage to change horses, entered into a parol agreement with the latter for the purchase of the horse in question, at the price of thirty-nine guineas, upon a warranty of soundness, and that the animal was not more than seven years old. Nothing was given in earnest of the contract. On the *Tuesday* following the horse was delivered to the plaintiff, and the price was paid. It turned out that the horse was unsound, and was of the age of seventeen years. No evidence was given that the plaintiff or his son knew that the defendant was by trade a horse dealer at the time the bargain was entered into. On the part of the defendant it was objected that the contract was void within the 29 *Car.* 2. c. 7. s. 2., having been made on a *Sunday*, and consequently that the plaintiff could not maintain the action. The learned Judge overruled the objection, and the plaintiff had a verdict. In *Easter* term, 1823, a rule nisi for a new trial having been obtained,

Talfourd (with whom was *W. E. Taunton*) now shewed cause. There are two answers to the objection made at the trial, first, that the defendant at the time of the contract was not exercising his ordinary calling of a horse dealer, and consequently the bargain was not void within the 29 *Car.* 2. c. 7. s. 2.; and, second, that the bargain was not in point of law complete on the *Sunday*, the horse not having been delivered until the *Tuesday* following. The statute 29 *Car.* 2. only applies to persons exercising any worldly labour, business, or work, of their ordinary calling, on the *Lord's* day. Now, here the defendant was not exercising his ordinary

1824.

Bloxsome v. Williams.

calling of a horse dealer at the time of the bargain, and therefore the contract is not void. The case of *Drury* v. *Defontaine* (*a*) is an authority to shew that it is not every contract made on a *Sunday* that is void. But in point of law, the bargain was not complete on the *Sunday*. This being a parol contract for property above the value of 10*l*. it would not be binding by the statute of frauds, unless there were a delivery and acceptance of the thing sold, or something paid in earnest of the bargain. On *Sunday* the bargain was only incipient, and could not be considered as consummated until the *Tuesday* following when the horse was delivered, and as it was one entire transaction, it would not become a binding contract until that day. Supposing the contract to be complete on the *Sunday*, still if in the interval the plaintiff had recollected or been informed, that it could not be made valid and binding he would not be bound to accept the horse on the *Tuesday*. He had a locus penitentiæ, and would not have been bound by a contract void in law. But if the contract is void, it must be upon the ground that it is malum in se, with knowledge on the part of the defendant; and he cannot be permitted to take advantage of his own wrong, in a transaction of which the plaintiff was innocent. Here the Court stopt him, and called upon,

Jervis (with whom was *G. R. Cross*) contrà. The defendant being a coach-master and a horse dealer, it is a false assumption of fact, that he was not exercising his ordinary trade when this contract was entered into. It may be true that the horse was not actually delivered until the *Tuesday*, but still if it was delivered in pursuance of a contract which was illegal, and void in its inception, that is sufficient to deprive the plaintiff of his right of action. No question arises here upon the statute of frauds, as to whether the vendor could have maintained an action for the price of the horse, or whether the vendee could have recovered damages

(*a*) 1 Taunt. 131.

1824.

BLOXSOME v. WILLIAMS.

for the non-delivery of it. The question is whether this was a void contract, having been entered into on a *Sunday* by the defendant in the ordinary exercise of his calling. Now the case comes expressly within the words of the statute 29 *Car.* 2. c. 7.; that statute is made in affirmance of the common law, and such a contract as this being malum in se it is altogether void. The doctrine that a party cannot take advantage of his own wrong does not apply to this case. This is an objection, of which the policy of the law requires that the defendant should take advantage. The circumstance of the plaintiff or his son not knowing that the defendant was exercising his ordinary calling as a horse dealer makes no difference, because upon the mutuality of the contract it is competent to either party to take advantage of the objection as to its validity.

BAYLEY, J.—I entirely accede to the whole of the decision in *Drury* v. *Defontaine*. If a man exercises any worldly labour, business, or work, of his ordinary calling, on the Lord's day, he will not be entitled to sue in a court of law in respect thereof, because he is subject to a penalty, and if any other person joins in enabling him to contravene the law, he also may be under the same disability; but when the facts proved here are attended to, I think it will not be found that this case depends upon that test of legality. We must assume that the plaintiff has not knowingly concurred in enabling the defendant to contravene the law, because there is no evidence of his having been aware that the defendant was a horse dealer at the time of this transaction; and if the defendant were allowed to insist upon this objection, it would be permitting him to take advantage of an illegality for which he alone is culpable. But I am of opinion that there is no illegality in the contract to which the objection is made. By the seventeenth section of the statute of frauds (*a*) it is enacted that " no contract for the sale of any goods, wares, or merchandizes for the price of ten pounds or upwards,

(*a*) 29 Car. 2. c. 3.

1824.
Bloxsome v. Williams.

shall be good, except the buyer shall accept part of the goods so sold, and actually receive the same; or give something in earnest to bind the bargain, or in part of payment; or that some note or memorandum in writing of the bargain be made, and signed by the parties to be charged by such contract, &c." Now in this case all that occurred on the *Sunday* rested in parol. Nothing was given to bind the bargain, and consequently it was not a contract made on that day. The horse is delivered and paid for on the following *Tuesday*. I do not think that would make it a contract of *Sunday* by relation, but a contract of the day on which the horse was delivered and the price paid. It would be a delivery according to the terms agreed upon on the *Sunday*, but nothing more. All that then passed related to the terms on which the sale was to take place. The bargain is only consummated by the actual delivery, and it becomes a contract of that day, although it incorporates into it the terms which had been specified on the day preceding, and therefore I consider this as a contract made on the *Tuesday* according to the terms agreed upon on the *Sunday*, and consequently valid in point of law. But assuming the whole to have been a *Sunday* contract, I can see nothing in the transaction which ought to deprive the plaintiff of his right to recover. According to the case of *Drury* v. *Defontaine*, it is not every contract made on a *Sunday* which is void; it may be indecorous, but it is not necessarily illegal. Undoubtedly it is illegal if the party making the contract is exercising his ordinary calling; and therefore there may have been illegality on the part of the defendant in this case, in making terms for the sale of his horse on the *Sunday*, but if the plaintiff did not know the fact there would be no illegality on his part. In this respect the plaintiff would be an innocent man, upon whom no blame, or penalty of the law would attach. Does it then lie in the mouth of the defendant to make the objection? It would be in violation of all reason, and against all common principles of justice, if he were allowed so to do. Indeed

1824.

BLOXSOME v. WILLIAMS.

I doubt very much whether the 29 *Car.* 2. c. 7. would apply to a case of this kind. That statute enacts, "that no tradesman, artificer, workman, colourer, or other person whatsoever, shall do or exercise any worldly labour, business, or work, of their ordinary calling, upon the Lord's day, and that every person, being of the age of fourteen years or upwards, offending in the premises shall, for every such offence, forfeit five shillings." I doubt whether a bargain of this kind could be considered as doing or exercising any worldly labour, business, or work, of the defendant's ordinary calling. I apprehend the object of that part of the statute was to prevent handicraftsmen, labourers, and others, from exercising their ordinary employments in a way offensive to the eye, and with reference to the decent observance of the sabbath day. But on the grounds I have already mentioned, I think this action is maintainable, namely, that this was not a sale on a *Sunday*; that if it was so, it does not appear that the plaintiff was privy to the fact of this being the defendant's ordinary employment, and that the defendant being the only person acting illegally, it does not lie in his mouth to make the objection, and thereby take advantage of his own wrong.

HOLROYD, J.—I also think the plaintiff is entitled to recover in this action. It appears to me that this was a contract with reference to the *Tuesday* and not the *Sunday*. But if it were not, it does not appear that the plaintiff was guilty of any breach of the law, in knowingly dealing with a person exercising his ordinary calling. The defendant may have subjected himself to a penalty for dealing in the manner stated, but it does not therefore follow that the plaintiff has done wrong. The contract may have been void, but that does not prevent the plaintiff from recovering back his money paid upon a contract, the consideration for which has failed. If it be not void then he is equally entitled to recover damages for the breach of it, the horse not being sound according to the warranty.

1824.

BLOXSOME v. WILLIAMS.

LITTLEDALE, J.—I am of the same opinion. It is unnecessary to decide whether the 29 *Car.* 2. extends to contracts entered into by merchants or other persons, making no shew of business; but it seems to me that the object of the statute was to prevent persons keeping open shop and disregarding the decency of the Lord's day by a public shew of their ordinary trades and occupations. But without determining whether the defendant has in this instance violated the statute, it is sufficient to say, that the contract in question could not be considered as complete until the *Tuesday* when the horse was actually delivered. I agree, however, with my Brother *Bayley* in saying, that assuming the contract to be void, for having been made on a *Sunday*, still it would not affect the plaintiff's right to sue, inasmuch as he was not privy to the fact of the defendant being a dealer in horses; and I also concur in thinking that the objection could not avail the defendant in answer to the action.

Rule discharged.

LORD BAGOT *v.* WILLIAMS.

Where plaintiff sued his steward in an inferior Court, for 4000*l.* which was a less sum than he knew to be due to him upon the final investigation of the defendant's accounts, and upon judgment by default verified for 3400*l.* only:—Held, upon a plea of judgment recovered in answer to a second action in this Court for the balance due, that the plaintiff was concluded by the action brought in the inferior Court.

THIS was an action of assumpsit for money had and received by the defendant to the plaintiff's use. The defendant pleaded first, the general issue non-assumpsit, and issue thereon; and second, that on the 7th of *September*, 1822, at the Court of our Lord the King, in and for the lordship or dominion of *Dyffryn Clwyd*, within the town of *Ruthin*, then held at *Ruthin* aforesaid, and within the jurisdiction of the said last mentioned Court, before D. J., then being chief steward of the said last mentioned Court, plaintiff levied his certain plaint against the defendant in a certain plea of debt of 4000*l.* upon and for the same identical causes of action

1824.

BAGOT v. WILLIAMS.

as those whereof the plaintiff hath above in his declaration complained against defendant; and such proceedings were thereupon had, that afterwards, to wit, on the 5th of *October*, 1822, plaintiff, by the consideration and judgment of the Court, according to the custom of the same Court, recovered against defendant his said debt, and 6*l.* 18*s.* for his damages, which he had sustained as well on occasion of the detaining of his said debt, as for his costs and charges by him about his suit in that behalf expended, whereof defendant was convicted as by the record remaining in the said court more fully appears. Replication, that the causes of action in the declaration in this action mentioned were not the same identical causes of action as those in defendant's second plea mentioned, and for and in respect whereof the said supposed judgment in the defendant's second plea mentioned was recovered. Issue thereon. At the trial before *Garrow*, B. at the last *Shrewsbury* Lent assizes, it appeared in evidence that the defendant had been the plaintiff's steward, and in that capacity had, between *November*, 1821, and *April*, 1822, received on his account various sums of money from different persons, arising from the sale of timber, amounting in the whole to about 5000*l.* Two other sums amounting to about 1700*l.* were also received by him on the plaintiff's account in *June*, 1822. In *September*, in that year, the defendant ceased to hold the situation of steward. Upon his secession, Mr. *Turner*, an agent for the plaintiff, was employed to investigate the defendant's accounts, and being examined on the trial, he stated as the the result of the investigation, that the defendant was indebted to the plaintiff in a sum of about 7000*l.*, and that in that calculation he took into account the whole amount claimed in the present action, except a sum of 46*l.* which had been received by the defendant on account of rent due to the plaintiff at *Christmas*, 1821; but of which he was not aware until after the judgment was recovered in the Lordship Court of *Ruthin*. He stated that he had directed an action to be brought in the Lordship Court on behalf of the plaintiff

for 4000*l.*, and the defendant having suffered judgment to go by default, he took out execution for 3400*l.* only, believing that the defendant had not sufficient assets to satisfy a larger sum. It was objected on this evidence, that the judgment recovered in the inferior Court was a bar to this action, and that the defendant could not now be charged with sums of money which had come to the knowledge of the plaintiff's agent to be due at the time of the proceedings in the inferior Court. The learned Judge was of opinion, that the plaintiff could not recover more than the 46*l.*, and that whatever sum of money constituted a subsisting debt at the time the action was brought in the Lordship Court, and was known to be so by the plaintiff's agent, who managed his affairs, must be considered as included in and forming one entire cause of action. He, therefore, directed the jury to find for the plaintiff for 46*l.* only, with liberty to the plaintiff to move to increase the damages if the Court should be of opinion that the plaintiff was not concluded by the judgment recovered in the inferior Court. In *Easter* term *W. E. Taunton* obtained a rule nisi to increase the damages, and

Patteson (with whom was *Peake*, Serjt.) now shewed cause, and contended that the judgment in the inferior Court was an answer to this action except for the sum of 46*l.* According to the evidence of Mr. *Turner*, he had taken into consideration, in the investigation of the defendant's accounts, every thing due to the plaintiff at the time the action below was brought, except the sum of 46*l.*; and, therefore, it was now incompetent to the latter to sue for sums of money which he might have recovered in the inferior Court. A party could not be permitted to split his demand, and bring separate actions for every item in a complicated account. Were this allowed, it would have the effect of harassing a defendant, and ruining him by endless expense. In the inferior Court the defendant had suffered judgment by default, but if he had pleaded payment, and

1824.
BAGOT v. WILLIAMS.

issue were taken on that plea, evidence might have been given by the plaintiff, in respect of all the sums which he knew to be due; and if after such evidence had been given, the plaintiff consented to take a verdict for a less sum than was actually due, he would have been concluded by the verdict. But the circumstance of the defendant having suffered judgment by default could make no difference in principle. The plaintiff had sued the defendant in the inferior Court for 4000*l.* and recovered a verdict for that sum, but was content to take out execution for 3400*l.* He was as much concluded by that proceeding as if upon a contested action he had consented to a verdict for a less sum than he was actually entitled to recover. This case was distinguishable from *Seddon* v. *Tutop* (*a*), because there the plaintiff recovered in a second action on the express ground that the cause of action in the latter was different from that in a former suit; but here the causes of action in respect of which the plaintiff now sought to recover, were the same identical causes of action for which he had already obtained judgment in the Lordship Court.

W. E. Taunton, *Campbell* and *R. V. Richards* in support of the rule. The plea of judgment recovered in the Court below is no answer to the present action, because the question is, whether in point of fact the plaintiff has recovered in that suit the sums which he now claims in this action. If the present cause of action be not included in the judgment recovered below, there is no rule of law which will preclude the plaintiff from recovering for a cause of action omitted on that occasion. This is the case of an agent receiving of different persons various large sums of money at different times. Each sum forms a separate cause of action, and the party to whom he is liable is at perfect liberty to bring a distinct action for each. It is not like a running account made up of small items, where it might be vexatious to make each item a subject of a separate action.

(*a*) 6 T. R. 607.

The circumstance of the plaintiff having recovered a judgment for 4000*l.* in the inferior Court, and afterwards taking out execution for 3400*l.* only, can make no difference, because that circumstance was induced by a consideration of the defendant's inability to pay more. The issue here is, whether the same causes of action in this suit were litigated in the Court below. If they were not, then the plaintiff is not concluded by the judgment there. The case of *Seddon* v. *Tutop* is an answer to the argument on the other side. In that case the plaintiff brought an action on a promissory note and for goods sold and delivered, but he recovered only on the promissory note. Upon a second action being brought for the goods sold, it was objected that the plaintiff could not recover, on the ground that the judgment in the former action was a bar, but the Court was of a different opinion, holding that it was a question of fact whether the causes of action were the same in the two suits, and that the onus probandi lay upon the defendant. So in the case of *Hitchen* v. *Campbell* (*a*) it was laid down by Grose, J. that the proper inquiry was whether the same identical causes of action in the second suit were litigated and determined in the first. Upon the same principal it was laid down in *Ravey* v. *Palmer* (*b*) that upon a reference of *all matters in difference* to an arbitrator, the award of the arbitrator upon such matters as are referred to him, will not preclude either party from suing upon a cause of action subsisting at the time of the reference, if such cause has not been brought under the consideration of the referee. In this case the sums now claimed formed no part of the former demand, for it appeared that a much larger sum was due to the plaintiff than was included in the former suit, and consequently the judgment in that action is no bar to the present demand.

ABBOTT, C. J.—I am of opinion that this rule ought

(*a*) 2 Sir W. Bl. 827. (*b*) 4 T. R. 146.

1824.
BAGOT v. WILLIAMS.

to be discharged. This is an action for money had and received by the defendant to the plaintiff's use. The defendant pleads a judgment recovered in the inferior Court for the same identical causes of action of which the plaintiff complains in his declaration. The plaintiff denies that they are the same identical causes of action, and the issue is, whether they are the same or different. According to the authorities cited, it appears that if the declaration in the second action is framed in such a manner as that the causes of action may be the same as those in the first, it is incumbent on the plaintiff to shew that they are different. What the form of action in the inferior Court was, we are not distinctly informed. If it is taken to have been a consessit solvere, there is no doubt it might have included the same causes which are the subject of this action for money had and received. There is no evidence before us, what causes of action were laid in the court below, for it appears that there was no writ of inquiry executed, so as to ascertain by evidence before a jury, what amount the plaintiff was entitled to claim. The defendant having suffered judgment by default, the agent of the plaintiff makes an affidavit of verification in proof of the debt, and takes upon himself to fix 3400*l.* as the sum for which execution shall issue. By so doing he placed himself in the situation of a jury, and it appears to me that whatever facts were then known to him must be considered in the same light as if they had been produced in evidence before a jury, and they had drawn their conclusion from them. Now if a jury, after having laid before them all the facts which were known to the plaintiff's agent respecting the transactions in dispute, had found that 3400*l.* was the only sum due, there can be no doubt that the plaintiff could not maintain a second action in respect of any of the sums of money which had been brought to the attention of the jury. Mr. *Turner*, the plaintiff's agent, distinctly stated, that at the time when the action was

commenced in the Lordship Court, he was aware that all the sums claimed in the present action were due, with the exception of the sum of 46*l*. Upon that admission so distinctly proved, I think we are bound to say, in point of law, that all the other items which are the subject of this action must be considered as constituting the same identical causes of action in respect of which the plaintiff had recovered judgment in the Court below, and consequently this rule must be discharged.

BAYLEY, J.—I am of the same opinion. The case of *Seddon* v. *Tutop* is perfectly distinguishable from this, and makes in favour of the defendant, rather than the plaintiff. There the plaintiff declared on a promissory note, and for goods sold. The plaintiff on judgment by default gave evidence upon executing the writ of inquiry of the note only, and none whatever on the count for goods sold and delivered; and he recovered a verdict merely on the count for the promissory note; and it was held that the judgment in that action would not prevent the plaintiff from recovering in a second for the goods sold and delivered. Lord *Kenyon*, in giving judgment, says, "The case of *Markham* v. *Middleton* (*a*) is extremely different from the present. There the plaintiff had but one demand, and though the jury gave inadequate damages for that demand, on account of the plaintiff not being prepared with proof of his whole bill, he would have been barred by that verdict if it had stood; but in this case there were two distinct demands, not in the least blended together, and though the plaintiff might in the first action have proved this demand, owing to inadvertence he did not, and the recovery on the note in that action is no bar to his demand in this which is for goods." Now let that observation be applied to this case, and it will shew the unreasonableness of allowing the plaintiff to recover in this action. When the

(*a*) 2 Stra. 1259.

1824.

Bagot v. Williams.

first action was commenced, the plaintiff had a demand, not for one specific sum of money, but for different sums received by the defendant on his account from several different persons and at different times. The plaintiff appoints an agent to investigate the defendant's accounts, and the agent ascertains that the plaintiff had demands against the defendant, in respect of all the sums now claimed, except 46*l.*; and with a perfect knowledge of all the defendant's transactions he commences an action for 4000*l.*, but in the result he is content to take execution for 3400*l.* only. What is the inference from this? It is manifest that that was a sum beyond which he had no right to make any claim, and there is no doubt that he acted upon that opinion. If that be so it is like the common case at nisi prius, where a less sum than the full damages is agreed to be taken by a plaintiff, in which case the plaintiff would be bound, and could not afterwards bring a second action for the money which he had agreed to give up. This it is true, was the act of the agent without the intervention of a jury, but I am of opinion that he is equally bound by his own act, as if there had been the verdict of a jury. Having once elected to abandon his claim, I think he is concluded, and cannot revive it in a second action.

Holroyd, J. concurred. (*a*)

Rule discharged.

(*a*) *Littledale*, J. was sitting at nisi prius for the Lord Chief Justice.

The Dean and Chapter of HEREFORD *v.* MACKNAMARA, Esq.

In an action against a sheriff for a false return to a *ca. sa.* it is not necessary to aver in the declaration that the sheriff had notice from the plaintiff that the defendant was within his bailiwick, so that he might arrest him.

DECLARATION in case against the sheriff of *Brecknock* stated, that plaintiffs, in the third year of the reign, &c. recovered a judgment in this Court against one *James Spencer* for a sum of 1701*l.* 10*s.* costs and damages in an action of covenant; that the same judgment was afterwards affirmed in the exchequer chamber upon a writ of error, and a further sum of 20*l.* adjudged to be paid to plaintiffs for their costs; that the record was remitted back into this Court, and a writ of testatum capias ad satisfaciendum sued out thereon on the 18th of *June*, in the fourth year of the reign, &c. and delivered to defendant the then sheriff of *Brecknock*; that the said *James Spencer* mentioned in the said writ, after the delivery thereof to defendant, and before the return thereof, to wit, on &c. "within the bailiwick of the said defendant, was in sight and in the company and presence of the said defendant, so that the said defendant being sheriff, &c. could and might at all or any or either of those days and times have taken the said *James Spencer* by his body, by virtue of the said writ at the suit of the said plaintiffs, yet the said defendant," &c. neglected to take the said *James Spencer*, and returned non est inventus, whereby, &c. Second count, the same, only stating that although the said *James Spencer*, after the delivery of the writ to defendant and before the return thereof, to wit, on &c. "was within the said bailiwick of the said defendant, so that the said defendant being sheriff, &c. could and might at all or any or either of those times, have taken the said *James Spencer*, &c. and although the said defendant was then and there required to take and arrest the said *James Spencer*, yet the said defendant," &c. neglected &c. concluding as before, but omitting to state the return of non est inventus. Third count, that defendant did take and arrest the said *James Spencer*, but afterwards suffered him to escape. To the third count, a plea of the general issue, not guilty; to the first and

1824.

The Dean and Chapter of HEREFORD v. MACKNAMARA.

second counts a special demurrer, setting forth as grounds of demurrer to the first count, that it is not stated in what term plaintiffs recovered the judgment against *Spencer*; that it should have stated that *a transcript of the record and proceedings*, and not "the said record and proceedings," was had into the exchequer chamber; that it should not have stated merely that "the record and proceedings aforesaid," but that *as well the record and proceedings aforesaid as the proceedings of the justices of the common bench and barons of the exchequer aforesaid*, were remitted back into this court; and that it is not alleged nor does appear that defendant ever knew or had any notice that *Spencer* was within his bailiwick, nor that *Spencer* was ever personally known by or pointed out to defendant;—and to the second count, that it is not stated nor does appear that defendant ever knew or had notice that *Spencer* was within his bailiwick, nor that defendant knew or had notice where he might find *Spencer* within his bailiwick, in order that he might arrest him. Replication to the plea, a similiter, and joinder in demurrer.

Campbell, in support of the demurrer. The first two counts are both equally bad. The first avers that *Spencer*, within the bailiwick of the defendant, was in sight and in the company and presence of the defendant so that he might have taken him; but it does not aver that notice of that fact was given to the defendant, or that he was required to arrest *Spencer*. Now the sheriff cannot be presumed to be personally acquainted with the features of every person within his bailiwick, and therefore notice that the party is within his bailiwick, and a requisition to arrest him there, must be given to the sheriff. *Gibbon* v. *Coggon* (*a*). Then the averment in the second count is even weaker than that in the first, for it is only that *Spencer* was within the bailiwick so that the defendant might have taken him, and that although the defendant was required to take him, he neglected to do so. That cannot be construed into a for-

(*a*) 2 Camp. 189.

mal and proper notice and demand; it is only saying that the defendant was required, which may mean required by the exigency of the writ, and not by the plaintiffs.

1824.

The Dean and Chapter of HEREFORD v. MACKNAMARA.

Abraham, contrà, was stopt by the Court.

ABBOTT, C. J.—This demurrer must be overruled. An averment of notice is not necessary in point of form, and an actual service of notice would not necessarily benefit the sheriff in point of fact, for it would not enable him to know the person of the party whom he was to arrest, if he was previously ignorant of it.

BAYLEY, J.—Taking the averment to mean a notice and demand by the exigency of the writ, and supposing that to be proved by the production of the writ, the sheriff *might* still have a good defence by shewing that he was ignorant of the person of the party to be arrested. But an averment of notice is certainly not necessary, and though ignorance of the man's person *may* be a defence at the trial, the omitting to aver that the defendant knew his person and had notice that *he* was within his bailiwick, will not render a declaration bad on demurrer.

LITTLEDALE, J. (*a*)—I am satisfied no case can be found in which it has been held that the plaintiff in the suit is bound to give notice to the sheriff where he may find the defendant. Nor is any such averment necessary. It is the duty of the sheriff, by himself or his officers, to adopt the proper measures for finding the person named in the writ, and if he does not, he must abide the consequences. It is impossible to say that either of these counts is bad on demurrer.

Judgment for the plaintiffs on demurrer. (*b*)

(*a*) *Holroyd*, J. was absent.

(*b*) Vide 4 Taunt. 117. Com. Dig. tit. Pleader, P. 2 E. 10. Cro. Eliz. 877. 27 Eliz. c. 8.

1824.

Lewis *v.* Catherine Lee.

A woman divorced à mensâ et thoro, and living apart from her husband, upon a separate maintenance, is a feme covert, and cannot be sued as a feme sole.

ASSUMPSIT for goods sold and delivered, and for money lent. Plea, that defendant prays judgment of the writ because she says that at the time of the suing out of the writ of plaintiff, she was, and still is, married to one *Francis Lee*, who is still living, to wit, at, &c. and this she is ready to verify; wherefore, because the said *F. L.* is not named in the said writ, she prays judgment of the same, and that the same may be quashed. Replication, that the said writ by reason of any thing by defendant in her said plea above alleged, ought not to be quashed, because, before the time of making the said several promises and undertakings in the declaration mentioned, the said *F. L.* exhibited a libel in the Arches Court of *Canterbury* against defendant; and that the said *F. L.*, on 4th *December*, 1814, obtained against the defendant in the said Court a definitive sentence of divorce from the bed and board of, and mutual cohabitation with, the said *F. L.*, for adultery committed by defendant with one *A. B.*; and that, before, and at the time of making the said several promises and undertakings in the declaration mentioned, and from thence, until, and at the time of issuing out the said writ of plaintiff against defendant, and still, she, defendant, lived divorced, separate, and apart from the said *F. L.*, her husband; and that she, defendant, during all the time aforesaid, and still, had a large, ample and sufficient allowance, as and for her separate maintenance, and which allowance has been during all that time paid to her, to wit, at, &c. And that defendant, so being divorced, separate and apart from her said husband, and having such allowance, the said several promises and undertakings in the declaration mentioned were made by the defendant as a feme sole, upon her own separate credit and account, and not upon the credit or

account of her said husband, to wit, at, &c. And this plaintiff is ready to verify, wherefore he prays judgment, and that the said writ may be adjudged good, and that defendant may answer over thereto, &c. Demurrer to the replication, and joinder in demurrer.

1824.
LEWIS v. LEE.

Dover, in support of the demurrer. This replication is bad both in form and substance. In form, because it departs from the language of the plea; refers to the promises laid in the declaration and not to the writ; contains double matter, namely, that the parties have been divorced *and* are living separate; and does not shew by what jurisdiction or before what authorities the divorce was decreed. It is also bad in substance, because the facts stated do not furnish a sufficient answer in law to the plea. That the divorce is informally pleaded is plain upon the highest authorities. Lord *Coke* says (*a*), "the proceedings and sentences in the Ecclesiastical Courts may be alleged summarily, as that a divorce was had between such parties, for such a cause, and before such a judge, and concurrentibus hiis quæ in jure requiruntur; for the judge must be alleged to the intent the Court may write to him, if it be denied." So *Comyns*, C. B. also says (*b*), "whoever pleads a divorce must shew before whom and for what cause." It is equally clear that the replication does not substantially answer the plea, because it does not shew that the defendant has ceased to be covert, and if she remains covert she cannot by law be sued alone. *Gilchrist* v. *Brown* (*c*) and *Ellah* v. *Leigh* (*d*). The former of those cases decided that a feme covert, though living apart from her husband, and in adultery, cannot be sued as a feme sole; and the latter, that such an action is equally insupportable, even though the wife has alimony during the suit in the Ecclesiastical Court, and has obtained credit in her own

(*a*) Co. Litt. 303. a. (m).
(*b*) Com. Dig. tit. Abatement. (H) 43.
(*c*) 4 T. R. 766.
(*d*) 5 Id. 679.

1824.
LEWIS v. LEE.

name, and on her own separate account. In *Marshall* v. *Rutton* (a), in which all the authorities on this subject were fully considered, it was solemnly decided (after two arguments before the Judges in the Exchequer Chamber) that a feme covert cannot bring an action, or be impleaded as a feme sole, while the relation of marriage subsists, and she and her husband are living in this kingdom, notwithstanding she lives separately from her husband, and has a separate maintenance secured to her by deed. Then, the only question here is, whether the defendant is still a feme covert, because if she is, the cases already cited shew that this action will not lie. Now that question depends upon the effect which a Court of common law will give to a divorce à mensâ et thoro; what effect is attributed to it by the Ecclesiastical Courts it is unimportant in this place to inquire. The common law rule has always been that a wife cannot sue without her husband, except where he is shewn to be civiliter mortuus. So Lord *Coke* says (b), "A wife is disabled to sue without her husband, as much as a monk is without his sovereign; and yet we read in books, that in some cases a wife hath had ability to sue and be sued without her husband; for the wife of Sir *Robert Belknap*, one of the Justices of the Court of Common Pleas, who was exiled or banished beyond sea, did sue a writ in her own name, without her husband, he being alive; whereof one said Ecce modo mirum, quod fœmina fert breve regis, Non nominando virum conjunctum robore legis." The same author afterwards adds (c), "An abjuration, that is a deportation for ever into a foreign land, like to profession, is a civil death; and that is the reason that the wife may bring an action, or may be impleaded, during the natural life of her husband. And so it is, if by act of parliament the husband be attainted of treason or felony, and, saving his life, is banished for ever, as *Belknap* was; this is a civil death, and the wife may sue as a feme sole. But if

(a) 8 T. R. 545. (b) Co. Litt. 132. b. (r). (c) Id. 133. a.

the husband, by act of parliament, have judgment to be exiled but for a time, which some call a relegation, that is no civil death." A feme covert, therefore, cannot be sued as a feme sole, unless a divorce à mensâ et thoro renders the husband civiliter mortuus. The ground of the divorce in this case is adultery, which was formerly held to warrant a divorce à vinculo matrimonii; though it has since been decided in *Foljambe's* case (*a*), in the 44. *Eliz.*, that it can warrant only a divorce à mensâ et thoro. A divorce à mensâ et thoro is not a divorce at all, in the full meaning of that word; it is no dissolution of the marriage contract; it does not annihilate the mutual obligations arising out of the relation of husband and wife: it only suspends them for a time, and is in fact no more than a temporary separation. [*Abbott*, C. J. Suppose husband and wife cohabit again after a divorce à mensâ et thoro, and issue are born, would they be legitimate?] It is not necessary to the present argument to decide so nice a question as that. The very form of the sentence of divorce à mensâ et thoro shews, that instead of operating as a dissolution of the marriage tie, it supposes and provides for the chance of a reunion; and it is upon this principle, that the party seeking the divorce, in order to obtain the benefit of the sentence, is required to enter into a bond to lead a life of chastity, and not to contract another marriage, so long as the offending party may live. The sentence runs thus:—" We do declare, that the said *A. B.*, ought by law to be divorced and separated from bed, board, and mutual cohabitation with the said *C. D.*, her husband, until they shall be reconciled to each other; and we do divorce, &c. bond being given."(*b*) This divorce, therefore, does not operate as an absolute and permanent separation, but is similar to the instance cited by Lord *Coke*, of a husband being not civiliter mortuus, but banished for a time. Where the

(*a*) Moore, 683. Noy, 100.

(*b*) Poynter on Marriage and Divorce, 182.

1824. LEWIS v. LEE.

divorce is absolute, and operates as the civil death of the husband, the wife thenceforward is regarded by the law as a widow. A divorce à mensâ et thoro will not bar the wife's dower, for Lord *Coke* says (*a*), "It is necessary that the marriage do continue, for if that be dissolved the dower ceaseth, ubi nullum matrimonium, ibi nulla dos. But this is to be understood when the husband and wife is divorced à vinculo matrimonii, as in case of pre-contract, consanguinity, affinity, &c. and not à mensâ et thoro only, as for adultery." Neither will it bastardize the issue; for, says Dr. *Burn*, speaking of divorce à mensâ et thoro, "Nor doth this kind either bar the wife of her dower, or bastardize the children." (*b*) All these authorities combine to shew that by the common law such a divorce does not extinguish the relation of husband and wife, or render the latter a feme sole. By a particular statutable enactment, where a wife elopes from her husband, and continues with an adulterer, she is barred of her dower (*c*); but that does not alter the bearing of the common law. It is clear that parties contracting a second marriage, pending a divorce à mensâ et thoro, may be proceeded against in the Ecclesiastical Courts (*d*); and although they are excepted from the criminal liabilities of the 1 Jac. 1. c. 11. by the third section of that statute, it has been decided, that but for that exception they would have been within the operation of the enacting clause. *Porter's* case (*e*). It is perfectly clear, therefore, that the coverture of this defendant has not been extinguished by the divorce à mensâ et thoro, and consequently some of the cases already cited, to which may be added *Hatchett* v. *Baddeley* (*f*), and *Lean* v. *Schutz* (*g*), are decisive to shew, that no action can be maintained against her as a feme sole. The defendant, therefore, is entitled to judgment on demurrer.

(*a*) Co. Litt. 32. a. (*b*) Burn's Eccl. Law, II. 502.
(*c*) 13. Ed. 1. st. 1. c. 33. Co. Litt. 32. a.
(*d*) 2 Burn's Eccl. Law, 503. (*e*) Cro. Car. 461.
(*f*) 2 Blac. 1079. (*g*) Id. 1195.

1824.

LEWIS v. LEE.

Abraham, contrà. The cases cited on the other side do not support the argument in aid of which they are called, nor do they go the length contended for. The principle which they establish is this, and no more, that parties who have once formed the relation of husband and wife, cannot by any agreement between themselves dissolve that relation, and throw off the legal obligations arising out of it, or vary the nature and character which the law has stampt upon the marriage state. Now the nature and character of the contract once existing between these parties as husband and wife, have not been varied by any agreement of their own, but by the decree of a Court having competent jurisdiction for that purpose. In *Ellah* v. *Leigh*, the suit in the Ecclesiastical Court was still pending when the action was brought, and though alimony had been allowed pendente lite, no decree had been pronounced: but here the replication states that the husband, before the commencement of the action, had obtained a definitive sentence of divorce from bed and board, and that the parties had ever since been, and were still living separate and apart. "A divorce for adultery was anciently a vinculo matrimonii; and, therefore, in the beginning of the reign of Queen *Elizabeth*, the opinion of the Church of *England* was, that after a divorce of adultery the parties might marry again: but in *Foljambe's* case, H. 44. Eliz., in the Star Chamber, that opinion was changed; and Archbishop *Bancroft*, by the advice of divines, held that adultery was only a cause of divorce à mensâ et thoro."(a) In *Stephens* v. *Totty*(b), it was held that a release by the husband, after a divorce causâ adulterii, of a debt owing to the wife before marriage, was good. [*Abbott*, C. J. But that was upon the ground that the marriage was not dissolved, for the reporter says, "all the justices held that in regard this separation doth not avoid the marriage absolutely, but they still remained man and wife, that this release of the baron was good to extinguish the duty."] Granting

(a) 3 Salk. 138. 2 Burn's Eccl. Law, 503. (b) Cro. Eliz. 908.

1824.

LEWIS v. LEE.

that a divorce à mensâ et thoro does not absolutely destroy the relation of husband and wife, it at least suspends it for so long a time as the parties actually live apart pursuant to the sentence; and upon that principle it has been held, that a child born during a separation after a divorce à mensâ et thoro, must be taken to be a bastard, unless the access of the husband is shewn. The parish of *St. George* v. *St. Margaret's, Westminster* (a). Then as it is averred by the replication in this case, that at the period when the action was brought, the defendant was living separate from her husband, pursuant to the sentence of divorce, she was living under a suspension of her matrimonial relation, and had ceased, for the time at least, to be a feme covert. She may, under such circumstances, be regarded as a feme sole, and consequently this action seems to be maintainable.

ABBOTT, C. J.—No case has been cited which decides that a sentence of divorce à mensâ et thoro, and a state of separation consequent thereon, so completely dissolves the pre-existing relation of husband and wife, as to render the wife in the eye of the law a feme sole; nor am I aware that any such case can be found. It appears clearly to me, as well from the language of the sentence of divorce, as from the result of all the authorities upon the subject, that a divorce causâ adulterii cannot dissolve the relation of marriage, though it does while the separation continues suspend some of the legal obligations which arise out of that relation. Then as the relation of marriage still subsists between these parties, the plea which the defendant has pleaded is true, and has received no answer in the plaintiff's replication. The defendant is a feme covert, notwithstanding her divorce and separation from her husband, and as such the law does not allow her to be sued as a feme sole. This action, therefore, cannot be maintained, and the judgment of the Court must be for the defendant.

(a) 1 Salk. 123.

1824.
LEWIS v. LEE.

BAYLEY, J.—Some of the cases cited on the part of the defendant are quite conclusive of the present. In *Hatchett* v. *Baddeley*, Mr. Justice *Blackstone* said, "I am clearly of opinion that in no case can any feme covert be sued alone, except in the known cases of abjuration, exile and the like; where the husband is considered as dead, and the woman as a widow; or else as divorced a vinculo: the contrary doctrine militates against the first principles of the *English* law, which considers the woman's powers, nay, almost her very being, as suspended during the coverture." In the later case of *Marshall* v. *Rutton*, Lord *Kenyon*, delivering the judgment of the Court, adopts similar language, and says, "We find no authority in the books to shew that a man and his wife can, by agreement between themselves, change their legal capacities and characters, or that a woman may be sued as a feme sole, while the relation of marriage subsists, and she and her husband are living in this kingdom." The present case clearly comes within the rule thus laid down, and must be decided upon the same principle. Even if the action could be carried on up to judgment, it must then ultimately fail, for how could the plaintiff sue out execution against a party who has in law no property?

HOLROYD, J.—I am entirely of the same opinion. The doctrine is not confined to the Courts of common law; we find an authority of the same nature in a Court of equity. Lord *Alvanley*, when Master of the Rolls, in the case of *Hyde* v. *Price* (a), after citing *Hatchett* v. *Baddeley*, said, that he had examined all the cases upon this subject collected together in *Lean* v. *Schutz*, and that they all concurred in shewing that, subject only to the exceptions enumerated by Mr. Justice *Blackstone*, no action could be maintained against a feme covert.

LITTLEDALE, J. concurred.

Judgment for the defendant.

(a) 3 Ves. jun. 443

1824.



WITHERS, Executor of J. BARKER, deceased, *v.* BIRCHAM and another, Executors of MOORE, deceased.

Though a covenant be joint in its terms, yet if the interests of the covenantees be several, each may sue separately for a breach.

THIS was an action of debt on an indenture made between the defendants' testator of the one part, and *J. Barker* and *J. Storton* of the other part, reciting two annuity deeds executed by two persons named *Tomlins.* By the first, *P. N. Tomlins,* and *H. N. Tomlins,* for the considerations therein mentioned, covenanted to pay *J. Storton,* during their lives or the life of the survivor, an annuity of 10*l.* quarterly. By the second, the same persons covenanted to pay in like manner a similar annuity to *J. Barker.* It was then witnessed by the indenture that in consideration of the sum of 15*l.* paid by *Storton* and *Barker* to *Moore* in equal moieties, *Moore* for himself his executors and administrators covenanted with *Storton* and *Barker,* their executors and administrators, that in case the grantors of the annuities, or either of them, should at any time make default in payment of either of the said annuities, he, *Moore,* his heirs, executors, &c. should and would, as often as default was made, pay to *Storton* and *Barker,* their executors, &c. the said annuities, or either of them. The declaration then averred that after the death of *Moore* and *Barker,* the grantors made default to the plaintiff, as executor of *Barker,* and assigned as breach of the covenant, that there was 5*l.* in arrear. The defendants pleaded in abatement that *J. Storton,* the joint covenantee, was still living, and ought to have been joined. Demurrer and joinder in demurrer.

R. B. Comyn in support of the demurrer. The question is whether this is such a covenant as will enable one of the covenantees to sue without joining the other. In deciding this case the Court must look to where the *interest* is, and not to the *words* of the instrument itself; for the rule is, that though a covenant be joint in its terms, yet if the interest and cause of action be several, the action may be brought

1824.
WITHERS v. BIRCHAM.

by one only. *Eccleston* v. *Clipsham* (*a*), *Windham's* case (*b*), *Huntley's* case (*c*), and *James* v. *Emery* (*d*), where this rule was distinctly recognised by *Gibbs*, C. J.; and it is a rule founded in good sense, and cannot be controverted. Now here though the words of the covenant be joint, yet the interest being several, the action may be brought by one of the covenantees alone. The only objection which can be urged on the other side is, that the words of the covenant being joint the covenantees must sue jointly; but according to the authorities cited, let the words of the covenant be never so joint, yet the interest being several each of the covenantees may sue for himself.

Pennington, contrà. The covenant in this case is clearly joint in its terms, and that being so the action must be brought in the names of both covenantees. In *Rolls* v. *Yate* (*e*) it is distinctly laid down, that if a bond is made to three, to pay money to one of them, all ought to join in the suit, for they are as one obligee, and if he who ought to have the money dies, the other two who survive must sue, although they have no interest in the sum contained in the condition. That case has never been overruled, but on the contrary it has been expressly recognised by *Buller*, J. in *Tippet* v. *Hawkey* (*f*). In *Windham's* case the principal point decided was not that for which it is cited on the other side. *Slyngsby's* case (*g*) is an authority to shew, that if it appears upon the face of the declaration, that the contract was made with others as well as the plaintiff, it will be error. It is clear that if the covenantees have a several interest the covenant must be treated as several, but à fortiori if the covenant be joint in the very terms of it, it cannot be treated otherwise than as joint. 2 *Leon*. 47. Here the covenant is joint in its very terms, and *Anderson* v. *Martindale* (*h*) is an

(*a*) 1 Saund. 153.
(*b*) 5 Rep. 8. a.
(*c*) Dyer, 326.
(*d*) 8 Taunt. 245. S. C. 2 J. B. Moore, 195.
(*e*) Yelv. 177.
(*f*) Bull. N. P. 158.
(*g*) 5 Rep. 18. b.
(*h*) 1 East, 497,

1824.

WITHERS v. BIRCHAM.

authority expressly in point to shew that a covenant with two to pay money to one, is a joint covenant; and it makes no difference in this case that a specific sum is to be paid to each of the two covenantees. This is a covenant which would enure to the benefit of the survivor of the covenantees, and the parties could not have used any other words than they have to carry their intention into effect.

ABBOTT, C. J.—Looking to the language of the covenant, it is undoubtedly joint, but if we look to the interest, we find that each covenantee has a separate and distinct interest, and it is a rule laid down in construing covenants of this nature, that where the interest is separate and distinct, the covenant is to be so construed, separately and distinctly, and consequently in this case the action is well brought. That the interest is separate is perfectly clear, for the covenant relates to two annuities for a certain sum, each granted severally and respectively to each of the covenantees. Each has an interest in the payment of the annuity granted to himself. The consideration for the deed on which the action is brought is also distinct and separate, because the sum of 15*l.* is to be paid in equal shares by *Storton* and *Barker*, and therefore each pays a separate consideration. Adverting to the authority of the cases collected in the note to *Eccleston* v. *Clipsham* and also to the last case of *James* v. *Emery*, we are all satisfied that where the interest of the party is several, the covenant, although joint in its language, is to be construed severally as to each of the covenantees; and that principle has not been broken in upon by any other case which has been cited. The cases of *Rolls* v. *Yate* and *Anderson* v. *Martindale* are distinguishable from this. In both, the two covenantees had no interest at all as matter of covenant, and if they had any interest it was not separate but joint. These cases therefore are distinguishable from the others which have been cited, and they do not affect or impugn the principle there laid down. I am of opinion, therefore, that the plaintiff is entitled to judgment.

1824



WITHERS v. BIRCHAM.

BAYLEY, J.—The cases cited by Mr. *Pennington* were correctly and legally decided, but they are distinguishable from those referred to by Mr. *Comyn*. In *Rolls* v. *Yate* the covenant was for the payment of one entire sum to one of two covenantees jointly, and therefore the party suing had no separate interest of his own. So in the case of *Anderson* v. *Martindale* the covenant was to pay one annuity to one of the two covenantees and, consequently, the same observation applies to that case. But here though the words of the covenant be joint, still it may be construed as a several covenant, for each of the parties has a separate interest. *Barker* is to have 10*l.* of his own separately, and so is *Storton*. Payment of one annuity to *Barker* would not discharge the covenantor from the payment of *Storton's* annuity, and each would have an action for the non-payment of the annuity to himself. According to the language of *Gibbs*, C. J. in *James* v. *Emery*, it is clear that if the interest of the parties is several, although the covenant itself be joint, yet it shall be taken to be several, and that where the interest is joint the action must be joint, although the covenant in terms appear to be joint and several. It is clear from the words of the covenant in this case, that a set-off might be pleaded in answer to an action brought by either of the covenantees. Suppose an action brought by *Barker* alone, the defendant might set off a separate debt due from him, and so vice versâ, a debt due from *Storton*. The language of this deed and the covenants fortify the opinion that the parties intended the interest to be several, and to give the covenantees a right of separate action. The covenant is with them, their executors and administrators. It is argued that this is to survive. If it is to survive, it would go to the survivor alone, and if the survivor died, the right of action would not go to the executors and administrators of the two, but of the survivor. But I am clearly of opinion that the words executors and administrators fortify us in the opinion, that it was in the contemplation of these parties, and was intended by them, that the interest should be several,

1824.

WITHERS v. BIRCHAM.

and that the right of action should be several also. There are no words of survivorship, and if it had been intended that the covenant should survive, words might easily have been introduced for that purpose.

HOLROYD, J. and LITTLEDALE, J. concurred.

Judgment for the plaintiff.

WHITE and another, Executors of W. WHITE, deceased, v. ANN WRIGHT.

A. lent 400*l.* stock to *B.*, taking as security an agreement from *B.* to replace the stock on request, and a bond for the payment of the produce of the stock, and reserving to himself the dividends of the stock for interest, and the option either to have the stock replaced, or the produce of it paid in money, with interest at 5*l.* per cent. —Held, an usurious bargain, and void by 12 *Ann*, s. 2. c. 16.

ASSUMPSIT on a special agreement, dated 31st *August*, 1815, to re-transfer 400*l.* three per cent. consols. The declaration contained various counts; some for not re-transferring the stock on the next transfer day next after the expiration of one year from the date of the agreement; some for not re-transferring within seven days next after notice to that effect given to defendant, namely, within seven days next after 3d *December*, 1822; and others for not paying over the interest and dividends upon the stock. Pleas, non assumpsit, and three special pleas, alleging usury in the transaction. Issue on all the pleas. At the trial before *Alexander*, C.B., at the last *Lent* Assizes for *Surrey*, a verdict was found for the plaintiffs, with 400*l.* damages, subject to the opinion of the Court upon the following case:

By memorandum of agreement made 31st *August*, 1815, between the defendant, *Ann Wright*, and the testator, *W. White*, (reciting, that the said *W. White* did, on the 29th day of *August* instant, at the request of the said *Ann Wright*, sell out for her accommodation 400*l.* stock in the 3*l.* per cent. consolidated bank annuities, at the price or sum of 55*l.* 15*s.* per cent., and which 400*l.* stock produced the sum of 223*l.*, which *W. White* has lent and advanced to *Ann Wright*, on her bond, bearing even date herewith, and also on security of a conditional surrender, of the same date, of certain copyhold premises in the manor of *Epsom*, which

1824.
WHITE *v.* WRIGHT.

she, *Ann Wright*, doth hereby admit and acknowledge. And whereas, previous to the said *W. White's* selling and transferring the said 400*l.* three per cent. consolidated annuities for the accommodation of *Ann Wright*, she did agree with *W. White*, within the time or space of one year from the date hereof, if thereto required by *W. White*, his executors, administrators, or assigns, to transfer, or cause or procure to be transferred unto and to the account of him, *W. White*, his executors, &c. the like sum of 400*l.* stock as aforesaid, in the said 3*l.* per cent. consols. and likewise to pay, answer, and make good unto him, *W. White*, his executors, &c. all dividends, interest and produce, which in the mean time he, *W. White*, his executors, &c. could have received or would have been entitled to in case the said 400*l.* stock had remained standing in the books of the Governor and Company of the Bank of *England*, in the name and as the property of him, *W. White*, his executors, &c.) *Ann Wright*, for herself, her heirs, executors, or administrators, agreed with *W. White*, his executors, administrators, or assigns, that she, her heirs, executors, &c. should and would, at her and their own proper costs and charges, on the request of *W. White*, his executors, &c. on the next transfer day next after the expiration of one year from the day of the date of that agreement, or at any subsequent transfer day, when thereto requested as aforesaid, transfer unto and to the account of him *W. White*, his executors, &c. in the books of the said Governor and Company, 400*l.* like stock as aforesaid in the said fund of the said Governor and Company, and likewise should and would in the mean time pay unto him *W. White*, his executors, &c. all dividends, interest and produce, which he, his executors, &c. could have received or would have been entitled unto in case the said 400*l.* stock had remained and continued standing in the books of the said Governor and Company in the name of and as the property of him *W. White*, his executors, &c. At the same time the defendant executed and delivered to the testator a bond, dated 31st *August*, 1815, in the penal snm of 440*l.*

1824. White v. Wright.

conditioned for the payment of 223*l.* and interest to *W. White*, on the 31st *August*, 1816. The defendant also made the conditional surrender of her property in the manor of *Epsom*, alluded to in the agreement. After *W. White's* death, namely, on the 3d *December*, 1822, the defendant was requested to re-transfer the stock within seven days from that time. The price of 3 per cent. consols. on the 31st *August*, 1815, was 55¾ per cent., and on the 3d *September*, 1816, 61¾ per cent., and on the 25th *March*, 1824, being two days before the trial, the price was 94⅛ per cent. The question for the opinion of the Court is whether this contract is void for usury.

Chitty, for the plaintiff. There is no usury in this contract. *Barnard* v. *Young* (*a*) will be relied on by the defendant to shew that there is, but that case, even if it be law, is essentially distinct from the present. By the very terms of the agreement there, the lender had from first to last an option to be repaid in money or in stock; here the lender had no such option: the only option was in the borrower, who might replace the stock if she chose. The recital of the agreement here, and the proviso, mean no more than that the borrower should have the power of holding the stock for a year if she thought fit. She might have transferred it back to the lender at any hour if she pleased, but she was not compellable to do so until the end of a year. This case, therefore, is within the principle laid down by *Doderidge*, J. in *Roberts* v. *Trenayne* (*b*), that "if I secure both interest and principal, if it be at the will of the party who is to pay it, it is no usury; as if I lend to one 100*l.* for two years, to pay for the loan thereof 30*l.*, and if he pay the principal at the year's end, he shall pay nothing for interest, —this is not usury; for the party hath his election, and may pay it at the first year's end, and so discharge himself." Now that is, in effect, the present case, and therefore, at any rate, the bond here cannot be held to be illegal.

(*a*) 17 Ves. jun. 44. (*b*) Cro. Jac. 507.

1824.
White v. Wright.

[*Holroyd*, J. In that case the security was taken for the payment of the principal only, but the usury was held to affect both the contract for the principal and that for the interest. The reporter says, "Secondly, it was moved, whether this lease, being taken for the payment of the principal money, and not for the payment of any part of the usury, be within the statute to make the bargain void; and it was resolved that it is; because it is for the security of money lent upon interest, and for the security of that which the statute intends he should lose; for otherwise it would be an evasion, out of the statute, that he would provide for the securing of the payment of the principal, whatsoever usurious bargain was made; which the law will not permit." So here, if there is usury at all, the bond will be tainted by it as well as the agreement.] The first question in this case is, whether the borrower might not, if she chose, have re-transferred the stock, without request by the lender, and there are cases which seem to decide that she might. [*Bayley*, J. Suppose she had proposed to re-transfer, the plaintiff might have said "No, I chuse to be paid in *money*." Or, suppose the stocks had fallen considerably, then the plaintiff might have elected to be paid in money. He always had an option to receive money instead of stock. The money lent was 223*l.*; the legal interest upon that was 11*l.* 3*s.*; he receives 12*l.*: is not that a contract for usurious interest?—*Abbott*, C. J. One of the contracts certainly gives him 12*l.*, which is more than the legal interest.] That is only upon a contingency, and therefore not within the statute. [*Littledale*, J. It is a loan, reserving in the first instance, more than 5*l.* per cent. interest. If it is purely a loan of stock, it is not usurious; but is that shewn to be the fact? Certainly not; and it was the plaintiff's duty to show it if he could. The bond is for money, not for stock; and if it is a loan of money, it is usurious.] But the plaintiff is not to receive both money and stock, or more than 5*l.* per cent. upon both money and stock, and therefore it is not usurious. He cannot possibly receive the 5*l.* per cent. interest

1824.
WHITE v. WRIGHT.

and the dividend of the stock; he must give credit for either the one or the other; but to constitute usury within the meaning of the statute of *Anne*, there must either be more than 5*l.* per cent. interest reserved expressly by the very terms of the contract, or the lender must secure to himself the chance of getting more than 5*l.* per cent., and reserve that excess, if it happens, to himself. [*Bayley*, J. The lender here contracts to advance either stock or money, reserving to himself the option which: then he ought to have made his election instanter; and if he does not, surely the contract is usurious.—*Abbott*, C. J. He receives both, or at least has the option of both. If there had been no statute of usury, he might have sued upon either of these contracts.—*Holroyd*, J. I very much doubt whether the borrower could have insisted on the right to replace stock within the year; it is to be replaced only "on request."] The words, "on request," must mean any time within the year: that has been so held, 1 Rol. Abr. tit. Condition, 440. l. 44., where the Year Books, 9 *H.* 7. 20., and 10 *H.* 7. 14. b. are cited. [*Holroyd*, J. Those were very different cases from the present: there the option was for the benefit of the borrower; here it is for the benefit of the lender, at least if the price of stocks should fall during the year.] The replacing the stock cannot, under any circumstances, be of any benefit to the owner of it; he can but possess so much stock, paying such and such a dividend. [*Bayley*, J. It may be very beneficial to him. If he lends the stock when the price is 80, and it is replaced when the price is 50, his stock so replaced will be worth more to him than it would have been if it had never been sold out.] Still, if the option is not in him, he can gain no advantage; and here, the option is in the borrower. It is impossible that both the contracts here can stand, or that the lender can derive any advantage from both; and taking either of them alone, the statutes of usury do not apply. [*Bayley*, J. There was a case of Ex-parte *Leycester* (*a*), sent by the Lord Chancellor

(*a*) Easter, 1816. Not reported.

for the opinion of this Court some few years since, and which was of this nature. *A.* applied to *L.* for an advance of money, and proposed *B.* as a surety for the repayment of the advance. *L.* not having cash for the occasion, agreed to make the advance in stock, and accordingly lent to *A.* 5000*l.* 3*l.* per cents. and some East India stock, for a limited period, the stock to be replaced within that time. *B.* being applied to, to guarantee the replacing of the stock, declined so doing, but agreed to guarantee a debt from *A.* to *L.* of 8000*l.* in money. The stock produced 8229*l.* and the dividends upon it were regularly paid by *A.* to *L.* Upon *A.'s* becoming bankrupt, the question was whether *L.* could maintain an action against *B.*, the surety for the 8000*l.*, as a money debt, and this Court held that he could.] That case makes strongly for the present plaintiff. There was an express agreement there that the lender should receive the dividends as well as the stock itself when replaced, and therefore the lender there secured to himself all the benefit which the present plaintiff has, in any view of the case, secured to himself. Here there are two contracts, but both cannot stand; the lender must make his option, or, whichever party has the option must elect which of the two he will abide by. When that has been done, and one of the contracts annulled, the other is perfectly legal, or, considered separately and independently of each other, both of them are legal. Here the lender did make his option by the act of receiving the dividends, and having done that, he can no longer resort to the bond, for he has made the whole one pure stock transaction, and as upon a stock transaction he is now proceeding, which he is clearly entitled to do. [*Bayley*, J. Would it be illegal for a man to lend me 200*l.* in money, reserving to himself the option of receiving at the end of six months 200*l.* with 5*l.* per cent. interest, or, 400*l.* with 2*l.* per cent. interest?] If the principal money was never put in hazard, it must be admitted that such a stipulation would render the contract usurious and void. [*Bayley*, J. Then if the lender cannot make such a stipulation

1824.

WHITE v. WRIGHT.

with reference to a loan of money, he is equally precluded from making it where the loan is of money's worth.—*Littledale*, J. It is quite clear, in my opinion, that the lender here reserved to himself such an option, for it was not in the power of the borrower to replace the stock before the termination of the year.—*Abbott*, C. J. Nor was the lender bound to accept the stock, in the shape of stock, until the year had run out.]

Comyn, for the defendant, was stopt by the Court.

ABBOTT, C. J.—I entertain no doubt upon this case. I am satisfied that the decision in *Barnard* v. *Young* is law, and that it must govern the present case, unless the fact of there being two contracts here makes an essential difference between them. Now that has been adjudged in *Roberts* v. *Trenayne* to be an immaterial fact. By construction of law the two contracts are one, the interest secured exceeds 5*l*. per cent. and therefore the whole transaction is illegal. The present therefore is precisely similar to the case of *Barnard* v. *Young*, for though the option there was reserved to the lender by express words, and here it is reserved to him by implication and in effect, the result is exactly the same; he has two instruments for his security, either of which he may enforce as he chuses, and upon either of which he might have maintained an action, if there had been no statutes against usury passed. In substance and effect, therefore, I cannot distinguish one case from the other. Here the lender stipulates for the chance of an advantage beyond the legal rate of interest, which is clearly an usurious contract; he was to have the stock replaced, if the price of stocks rose, and he was to be repaid in money, if the price of stocks fell. That is usury, in the fullest sense of the word, and consequently the plaintiff cannot maintain this action.

BAYLEY, J.—It is not impossible that the plaintiff when he entered into this contract acted innocently, and in igno-

rance that he was violating the law, and consequently the present may not be a very honest or conscientious defence. But we are only to consider whether the case is, or is not within the statutes of usury, and I am clearly of opinion that it is. The 12 *Ann.* st. 2. c. 16. enacts, "that all bonds, contracts, and assurances whatsoever, &c. whereupon or whereby there shall be reserved or taken above the rate of 5*l.* in the 100*l.* shall be utterly void." Then is this a contract whereby more than 5*l.* per cent. is reserved? If it reserves 5*l.* per cent. only, in the first instance, with any collateral security for or chance of profit beyond that amount, it does reserve more than the legal interest. If the option here had been reserved to the borrower, that would have been both fair and legal; but being reserved to the lender, and there being two contracts out of which he is to chuse, he is bound to make his election in the first instance. If this is to be considered a loan of stock, then the lender is to have the dividends during the year, and his stock replaced at the end of it. That would be purely a stock transaction, and might be beneficial to the borrower, because in the course of the year the price of stocks might fall. If it is to be considered as a loan of money, then the lender is to have 5*l.* per cent. interest during the year, and his principal repaid at the end of it. Either of those, singly, and independently, would be a legal contract. But if the lender is to chuse at the end of the year which of the two he will adopt, the whole transaction becomes illegal, because he reserves to himself the chance of a benefit beyond the dividend in the one case, and the 5*l.* per cent. in the other; for if the price of stocks should fall, he will elect to be paid in money, if it should rise, to be paid in stock. Then look at the facts of this case. The loan in the first instance is of 223*l.* in money, to secure the repayment of which the lender takes a bond. In addition to that he takes an agreement from the borrower to replace so much stock in his name "upon request," and as she could not replace that stock till he requested her so to do, he had the option which security he would rely upon,

1824.

WHITE v. WRIGHT.

the bond, or the agreement, according as he found the one or the other most advantageous. Upon general principles, therefore, this seems to me to be an usurious contract, and I also think that the case of *Barnard* v. *Young* is a direct authority for so holding.

HOLROYD, J.—This was evidently an usurious bargain in its inception, and where a contract is originally tainted with usury, it cannot be purged by any subsequent act of the parties. The principles laid down in *Barnard* v. *Young* appear to me unanswerable in themselves, and strictly applicable to the present case. The only shade of distinction between the two, is, that here there are two contracts; but *Roberts* v. *Trenayne* is a decisive authority for saying that such a distinction is immaterial. This may be a case of hardship, but I think it is a case clearly within the statute.

LITTLEDALE, J.—I am of the same opinion. The two contracts here in fact constituted but one transaction. In one point of view this is a plainer case of usury than that of *Barnard* v. *Young*, for in that there was no express stipulation for more than legal interest; the Court held that the reservation of the chance of it was usurious: here there was an absolute certainty that by means of one or other of the securities taken, more than 5*l.* per cent. would be obtained.

Judgment of nonsuit.

BARFORD, Administrator of NATHANIEL PITTS, *v.* VINCENT STUCKEY. (In error)

By an annuity deed reciting that *C.* had devised lands to *A.* and *B.* in settlement, with remainder over to *D.* in default of their issue male, *A.* and *B.* in regard that *C.* had made no other provision for *D.*, and in consideration of their esteem for him, agreed with *D.* his executors and administrators, to pay him an annuity of 500*l.* for 21 years, if they or the survivor of them should so long live; and in case of the death of *D.* during the term, to his child or children (if any), in such proportion

THIS was a writ of error from the Common Pleas. The declaration was in debt upon an annuity deed dated 11th

1824.

Barford v. Stuckey.

May, 1810, made between one *Barnaby John Bartlett* and defendant of the one part, and *Nathaniel Pitts*, (the intestate,) of the other part, and reciting that one *John Stuckey*, deceased, had by his will devised to certain trustees therein named, and their heirs, certain lands, and hereditaments therein described, to hold, first, to the use of *B. J. Bartlett* and his assigns for life, remainder to his first and other sons, &c; and in default of issue male of *B. J. Bartlett*, remainder to the use of *Vincent Stuckey* and his assigns for life, remainder to his first and other sons; and in default of issue male of *V. Stuckey*, remainder to the use of *N. Pitts* (the intestate) and his assigns for life, with various other remainders over; that *J. Stuckey* (the testator) by his will had devised to the said trustees certain other lands and hereditaments therein also described, to hold to them and their heirs, to the use of *V. Stuckey* and his assigns for life, remainder to the use of his first and other sons; and in default of issue male of *V. Stuckey*, remainder to the use of *B. J. Bartlett* and his assigns for life; remainder to the use of his first and other sons, and in default of issue male of *B. J. Bartlett*, remainder to *N. Pitts* and his assigns, with various other remainders over; that in regard that the said *John Stuckey* did not in and by his said will make any further or other provision for the said *N. Pitts*, and in consideration of the great regard and esteem which the said *B. J. Bartlett* and *V. Stuckey* bore towards the said *N. Pitts*, they had agreed to grant him an annuity of 500*l*. per annum, for the term of 21 years, in case they or the survivor of them should so long live, and be in actual possession of the said settled hereditaments, to commence from the

proportion as he should appoint, and in default of such appointment, to all his children equally; and if he should leave no child, to his wife, as long as she should continue his widow. *D.* agreed with *A.* and *B.*, their executors and administrators, that in case he or his heirs should come into possession of the lands under the will of *C.*, then *D.* his heirs, executors, or administrators, would repay to *A.* and *B.* or the survivor of them, their and his executors or administrators, all sums of money received by him, his children, or wife, for or on account of the annuity. *D.*, his wife, and only child, all died during the term:—Held, in debt by the administrator of *D.* and his child, that the deed was not an absolute grant of an annuity for 21 years, but was determinable by the death of *D.* his child, and wife, and therefore that the plaintiff could not recover the arrears of the annuity in respect of either of his intestates.

1824.

BARFORD v. STUCKEY.

25th of *March* then last past, to be paid half yearly; *and in case of the death of the said* N. Pitts *before the expiration of the said term of* 21 *years,* they, the grantors, agreed that they, or the survivor of them, would pay the said annuity (in certain proportions respectively) for the term aforesaid, subject as aforesaid, to and for the use and benefit of the child and children of *N. Pitts* (if any), in such proportion as he, *N. Pitts,* should by deed or will appoint; and in default of appointment, for the benefit of all his children equally; but in case there should be no child of *N. Pitts* living at the time of his decease, happening within the said term, then the said annuity was to be paid in like manner for the then remainder of the said term of 21 years, in case the grantors, or the survivor of them, should be then living, unto his then wife, for and during such period only of the said term as she should continue his widow; but in case *N. Pitts* or his heirs should at any time during the said term come into the possession of the said manors, messuages, farms, lands, and hereditaments, under the limitations in the will of *J. Stuckey* expressed, or should otherwise by operation of law obtain or get into the possession of the hereditaments and premises by the will of *J. Stuckey* devised, then the said annuity was to cease and be utterly void; and then, in either of such cases, *N. Pitts,* his heirs, executors, or administrators, were to repay to the grantors respectively, and to the survivor of them, their and his executors and administrators, in the proportions before mentioned, all sums of money by him *N. Pitts, his children, or wife, received for and on account of the said annuity;* covenant by the grantors severally and respectively to and with *N. Pitts,* his executors and administrators, to pay, during the said term of 21 years, to commence as aforesaid, if they should so long live, to *N. Pitts,* or in case of his death within the said term, then to or for the use of his child or children, if any, but if not, then to his then present wife, in case she should remain his widow, an annuity of 500*l.* half yearly, in the proportions before mentioned, without any deduction, &c.; covenant by *N. Pitts,*

1824.

BARFORD v. STUCKEY.

that in case he or his heirs should at any time during the said term come into the possession of the said manors, &c. under the limitations in the will of *John Stuckey* expressed, he, *Nathaniel Pitts*, his heirs, executors and administrators, should pay to the executors and administrators of the grantors, or the survivor of them, all sums of money received by him, his said children, or wife, for or on account of the said annuity. Averments, that *Pitts* died during the term without making any will or appointment; that at the time of his death *Martha Elizabeth Pitts* was his only child; that she died during the term on 1st *Novemember*, 1818, intestate; that administration of her estate and effects was granted to plaintiff on 15th *November*, 1818; that the wife of *Pitts* died in his lifetime; and that administration of the estate and effects of *Pitts* was granted to plaintiff on 23rd *December*, 1820; breach, that defendant hath not paid his proportion of the said annuity to plaintiff since the decease of *Pitts*, nor to or for the use of any party whatsoever. Demurrer to the declaration, craving oyer of and setting out the deed. Joinder in demurrer. Judgment for the defendant in the Court below (*a*). General assignment of error in the common form.

Tindal, for the plaintiff. The judgment of the Court below must be reversed. The question for decision depends entirely upon the construction of the deed, and is shortly whether that deed is a grant of an annuity to *Pitts*, and his legal representatives, for 21 years, absolutely; or to *Pitts* for 21 years, if he should so long live, and, in case of his death, to his widow and children, for such residue of that term only as they should survive him. The Court below have put the latter construction upon the deed, but in that view of it they are clearly mistaken. By the terms of *John Stuckey's* will, *Pitts*, the intestate, could take no interest in his estates till after the preceding interests of

(*a*) Vide 5 J. B. Moore, 23. 2 Brod. and Bing. 333. S. C. 8 J. B. Moore. 1 Bing. 225. S. C.

1824.
BARFORD v. STUCKEY.

Bartlett and the defendant had ceased; to supply that deficiency the annuity was granted, and by the language of the recital was clearly meant to be an annuity for 21 years absolutely; though in the subsequent parts of the deed, certain special arrangements are made in case of the death of *Pitts* during the term. This deed, like all others of a similar nature, must be construed strictly according to its language, and most against the covenantor. It will be said that there is apparent upon the face of the deed an intention of the covenantors that the annuity should cease upon the death of *Pitts*, his wife, and his children; but such a deed cannot, like a will, be construed according to *intention*, it must be construed strictly according to its *language*. Lord *Cholmondeley* v. *Clinton*(*a*). It begins with an absolute agreement to grant an annuity for 21 years, if the grantors shall so long live, and unless there are subsequent express words qualifying that agreement, that must operate as a grant of an annuity for 21 years. It goes on to provide that in case of the death of the original grantee, the annuity shall go, first to his child or children, and then to his widow, him surviving; but there are no words which expressly shorten the term to any thing less than 21 years, in either of those cases. It then provides, that if the grantee, or his heirs, shall ever come into possession of the estate, the annuity shall cease; so that the grantors perfectly well knew how to introduce a clause of cesser when they thought it needful, as they had before introduced a clause of condition; and the inference, therefore, is, that no cesser was intended except where it is directly expressed. [*Holroyd*, J. In what part of the deed is there an absolute grant of the annuity for 21 years? There is a recital of an agreement to grant such an annuity, and a covenant to pay it under certain conditions and in certain modes; but they do not constitute an absolute grant for the whole term.] Coupled together, and read with reference one to the other, they will constitute an absolute grant. [*Littledale*, J.

(*a*) 2 B. and A. 625.

1824.

BARFORD *v.* STUCKEY.

There is not even an agreement for an absolute grant for 21 years.—*Bayley* J. The object of the grantors was to provide a maintenance for *Pitts*, his widow, and children. Surely when they had all died, the grant ceased with its object. The rule of construction of deeds as laid down in *Sheppard's* Touchstone (*a*) certainly is, " that all the words of the deed in construction be taken most strongly against him that doth speak them, and most in advantage of the other party. But," it is added, " this is to be understood with this limitation, that no wrong be thereby done, for it is a maxim in law, quod legis constructio non facit injuriam."—*Abbott*, C. J. Suppose *Pitts* had died leaving a widow, and no child; she would clearly have been entitled to the annuity while she remained sole. But suppose she had married, would the annuity then have been payable to the administrator of *Pitts*, her first husband?] The present argument certainly must go the length of contending that it would. This is a question of the grantor's intention, but it is a wholesome and established rule that the words to defeat a grant must be equally strong as the words to confirm it, or they cannot operate against the grantee. The plaintiff, however, is administrator of the daughter of *Pitts*, as well as of *Pitts* himself, and, therefore, is clearly entitled to something. [*Abbott*, C. J. Does the declaration aver that any part of the annuity became due during the daughter's life?] There certainly is no such averment, but that does not seem material; and if it was, it should have been made the subject of a special demurrer.

Peake, Serjt. contrà. Nothing requiring comment arises upon the second point, because the declaration contains no allegation that the annuity was in arrear during the daughter's life; therefore, as *her* administrator the plaintiff cannot have any claim. Then, as to the first point, the construction of the deed, the Court must look at the deed

(*a*) 84. *p. 88. Et vide id. n. (3). id. 251. n. (1).

1824.
BARFORD v. STUCKEY.

as a whole, and so construe it as to give effect to all its intents. The words in a grant are certainly to be taken most strongly against the grantor, where there is any ambiguity; but here there is none, and, therefore, that rule does not apply. What is the plain intention of the grantors, as it is to be collected from the whole of the deed? It is a mere act of benevolence and generosity by the grantors; a perfectly voluntary deed; the object and motive of which was to make a provision for *Pitts* and the different members of his family *during their lives*, with the plain intention not to make the annuity a grant to himself absolutely, in which case he might have sold or transferred it, or squandered it away, to the injury of his family, and in defeat of the object of the grantors. But the concluding covenant by *Pitts* at once disposes of this point and of the whole case, for he covenants not simply to repay the money he himself may have received, but also for the repayment of that which his widow or children might receive. [Here the Court stopt him.]

ABBOTT, C. J.—I entertain no doubt as to the true construction of this deed. This is the case of a voluntary grant of an annuity, founded upon the devise in the will of Mr. *John Stuckey*, as recited in the deed; and it is argued that it is an absolute grant of the annuity for 21 years at all events. But I think the words which follow the grant to *Pitts*, "and in case of the death of the said *N. Pitts*," &c. have precisely the same import, and impose the same qualification upon that grant, as if it had contained the words "if he shall so long live," in the first instance; for they provide for a different course of payment in case of his death. Without relying, therefore, on the covenant for repayment at the end of the deed, I think that upon the fair construction of the words of the grant itself, the grant to *Pitts* was for his life only, and consequently that no action will lie by his administrator to recover the arrears of the annuity since his decease. At the same time, the words of

1824.

BARFORD v. STUCKEY.

that covenant strongly tend to shew the object and intention of the grantors, which clearly was, to provide for him and his family during their lives, but during their lives only, and the construction which I have put upon the deed is perfectly consistent with that object and intention. The judgment of the Court below must, therefore, be affirmed.

BAYLEY, J.—I think the judgment of the Court of Common Pleas was right. Looking at the language of the deed, I am satisfied the grantors intended that the annuity should cease if the original grantee died without wife or child, or whenever his surviving child or wife should cease to exist, their only object being to provide for those particular persons during their lives. The occasional use, and disuse, of the words, "executors and administrators," strongly confirms this view of the case. The covenant to pay the annuity is with *Pitts, his executors and administrators*, and there those words are properly and studiously introduced; because, if there were any arrears at the time when *Pitts* died, they might then be recovered by his executors or administrators. But the payment is to *Pitts* only, not his executors or administrators, but to him, or in case of his death, to his widow, or child: there is no other limitation whatever. Then in the stipulation for repayment by *Pitts*, the words "his heirs, executors or administrators," are added, but it contains no words having any reference to previous payments of the annuity to the executors or administrators, either of *Pitts*, or his child, or his widow. I am, therefore, of opinion, that the annuity was confined to the life of *Pitts*, as the original grantee; and, therefore, that his legal representative, the present plaintiff, has no right to maintain this action.

HOLROYD, J.—I think nothing more was granted, or meant to be granted by this deed, than an annuity to *Pitts*, for his life, or for 21 years, determinable on the deaths of himself, his widow and children: and that the deed must

1824.
BARFORD v. STUCKEY.

be construed the same as if the words "if he should so long live," had formed part of the grant to *Pitts*. The persons intended to be benefited are specifically and particularly named, and no mention is made of the executors or administrators of any of them. The intention of the grantors, therefore, clearly was, that the annuity should not extend to their legal representatives, and the law cannot in the face of such an intention imply that it is so to extend.

LITTLEDALE, J.—There is no doubt that if an annuity or a lease for 21 years be granted to a man, it will go to his executors, if there is no special limitation to the contrary. Here there is a special limitation of the annuity to *Pitts* and his chidren, and his widow, *for their lives*; the grant, therefore, is not an absolute but a personal and conditional grant, studiously taken out of the general course, and clearly exempt from the operation of the general rule. This action, therefore, is not maintainable.

Judgment affirmed.

BUSHBY and another, Executors of JOHN BUSHBY, deceased, *v.* J. M. DIXON, Heir of J. M. DIXON, deceased.

A. died seised of lands in fee simple, which were at that time in the possession of a tenant from year to year, and by her will devised them to *B.* leaving *C.* her heir at law. *C.* died without ever having received any esplees or ever having made any entry. *D.* his son and heir at law, recovered the lands in ejectment, on the ground that they did not pass by the devise from *A.* to *B.*:—Held, that the estate was assets in *D.*'s hands by descent from his father, and liable to the payment of a bond given by his father in his lifetime.

THIS was an action of debt on a bond bearing date 12th *November*, 1795, executed by *John Milbourn Dixon*, deceased, and *Lucy Dixon*, deceased, to *John Bushby*, deceased, in the penal sum of 360*l.* conditioned for the payment of 180*l.* with interest at 4¾ per cent. on the 12th *November*, 1796. Pleas, 1. Non est factum. 2. Payment on the day mentioned in the condition. 3. Payment after the day mentioned in the condition, and before exhibiting plaintiffs' bill, to wit, on &c. at &c. and 4. Actio non, be-

1824.

BUSHBY v. DIXON.

cause, he the said defendant hath not, nor at the time of the exhibiting the bill of the said plaintiffs, in this behalf, nor at any time before or since had he, any lands, tenements, or hereditaments, by descent from the said *John Milbourn Dixon*, in fee simple, and this, &c. wherefore he prays judgment if the said defendant as heir of the said *J. M. D.* deceased, ought to be charged with the said debt by virtue of the said writing obligatory. The issues on the first, second and third pleas were found for the plaintiff. To the fourth plea the plaintiff replied, that the defendant hath, and at the time of exhibiting the bill of said plaintiffs in this behalf had, sufficient lands, tenements, and hereditaments by descent from the said *J. M. Dixon* in fee simple, wherewith the said defendant could and might, and ought to have satisfied the said debt above demanded. At the trial before *Holroyd*, J. at the *Cumberland* Summer Assizes, 1823, the jury found their verdict for the plaintiffs on the fourth issue, subject to the opinion of the Court on the following case.

Lucy Dixon, the obligor of the bond, at the time of making her will, and also of her death, as hereinafter mentioned, was seised in fee of the adjoining tenements of *Catlowdy* and *Simeons Onset*, being both of freehold tenure, and situate in the parish of *Kirk Andrews upon Esk*, in the county of *Cumberland*, and by her will duly executed, devised her messuage or tenement called *Catlowdy* to her daughter *Ann*, the wife of *John Milbourn*, for her life, with power to dispose thereof by will. *Lucy Dixon* died so seised on the 15th *June*, 1797. At the time of making her will, and also of her death, both *Catlowdy* and *Simeons Onset* were occupied as one farm, being in the possession of the same person, as tenant from year to year of the whole, under one rent, which person continued in possession as tenant until the year 1807. From the time of the death of *Lucy Dixon*, *Ann Milbourn* and *John Milbourn*, her husband, contending that *Simeons Onset* passed by this devise, received the rents of both estates during her life. *Ann*

1824. Bushby v. Dixon.

Milbourn died in 1801, and after her death her husband *John Milbourn* received the rents and profits both of *Catlowdy* and *Simeons Onset*, as tenant by the courtesy, until his death, which took place in *June*, 1815. In 1807 the said *John Milbourn* granted a lease of the two tenements to *John Forster* and *Adam Forster* for nine years, under which the lessees held the possession, and paid the rent to *John Milbourn* during his life. The last rent which was paid by them to *John Milbourn* was at *Whitsuntide*, 1815, and then due, which was subsequently to the death of *John Milbourn Dixon*, the other obligor, which took place on the 27th *April*, 1815. The obligor, *John Milbourn Dixon*, was the heir at law of *Lucy Dixon*, and he, in *Hilary* vacation, 1815, served a declaration in ejectment upon the tenant in possession of *Simeons Onset*, claiming it as heir at law of *Lucy Dixon*, but he died as before stated, on the 27th *April*, 1815, and no farther proceedings took place therein. The defendant after the death of his father brought another ejectment, and after obtaining a judgment by default recovered the possession of *Simeons Onset* in *Trinity* vacation, 1815. Afterwards one *Isaac Milbourn*, the son of the said *Ann Milbourn*, brought an ejectment for the same premises, which was defended by *J. M. Dixon*, the present defendant, upon the trial of which a verdict was found for the defendant, and a rule nisi having been obtained to set aside that verdict, the Court of King's Bench upon argument discharged the rule, being of opinion, that *Simeons Onset* did not pass either by the will of *Lucy Dixon* or *Ann Milbourn*. The question for the opinion of the Court is whether the present defendant took *Simeons Onset* by descent from his father. If the Court shall be of opinion that he did, the verdict to stand; otherwise, a nonsuit to be entered.

Patteson, for the plaintiffs. The question in this case is, whether the defendant's father was ever actually seised of *Simeons Onset* so as to make that estate assets in the defendant's hands, and render him liable to the payment of the bond

1824.

BUSHBY v. DIXON.

on which the action is brought. It must be admitted according to the doctrine in *Co. Lit.* 11 *b. n.* 3. that a mere seisin *in law* will not be sufficient for that purpose; it must be a seisin *in fact*. If, however, the defendant's father was seised in fact but for a single moment, that will entitle the plaintiff to maintain this action. It is stated in the case that at the time of *Lucy Dixon's* death, the estate in question was in the possession of a tenant from year to year. From this it is clear that at that time the defendant's father could not enter because there was then an outstanding term; but there are express authorities for saying, that possession by tenant for years is the possession of him who is entitled to the freehold. This doctrine is laid down in *Co. Lit.* 15 *a*, and the same rule was held in *Brown's* case (*a*) with respect to copyholds, where it was held, that a copyhold tenement, held by a lease for years with the license of the lord, will make a possessio fratris, in the person entitled to the copyhold in fee. Mr. *Hargrave*, in his note 82 to *Co. Lit.* 15 *a*, refers to *Jenkins's Cents.* 242, as an authority for shewing that the entry of a devisee for years will make a possessio fratris. In *De Grey* v. *Richardson* (*b*) it is held that possession by tenant for years is sufficient to give actual seisin to a feme covert, so as to make her husband tenant by the courtesy. So in *Goodtitle* v. *Newman* (*c*) the possession of guardian in socage was held to be the possession of the heir. In *Doe* v. *Wichelo* (*d*), Lord *Kenyon*, in pointing out the difference between freehold and chattel leases outstanding, observes, " In the former case, unless the elder brother afterwards obtained possession by the receipt of rent or other acknowledgment, the descent will be to the younger brother of the half blood, in preference to the sister of the whole blood; but in the case of a chattel lease outstanding, the possession of the tenant is the possession of the landlord, and there the rule of possessio fratris attaches," and

(*a*) 4 Rep. 21. Moore, 125. See Vin. Abr. tit. Descent. [K] pl. 34. S. C.
(*b*) 3 Atk. 469. See Co. Lit. 129 *a*. (*c*) 3 Wils. 516.
(*d*) 8 T. R. 213. Vide *Doe* v. *Keen*, 7 T. R. 390.

1824. Busнby v. Dixon.

his lordship relied upon the passages in *Co. Lit.* 15 *a*, and *Jenk.* 242. If then these authorities shew, as they clearly do, that the possession of a tenant from year to year is the possession of the person entitled to the freehold, it follows that the defendant's father was actually seised immediately on the death of *Lucy Dixon*, and consequently the estate in question would be assets in the defendant's hands, as his heir. It will, however, be said, on the other side, that the subsequent payment of rent to the supposed devisee of *Simeons Onset* will operate as an abatement of the defendant's father. But such a consequence does not follow. The payment of rent to the supposed devisee might, perhaps, be considered as a disseisin of *J. M. Dixon*, but not an abatement. The tortious receiving of rent by the supposed devisee subsequently to the death of *Lucy Dixon* could not operate as an abatement. An abator must do some act before entry by the heir, in order to effect an abatement, but here no act could be done to effect that object, because the land was in the possession of a tenant for years, and the heir was thereby protected against an abatement. In *Co. Lit.* it is laid down that the possession of a tenant for years protects the heir from abatement. [*Bayley*, J. Can you work a disseisin against the will of the party disseised, unless there is an actual ouster?] The receipts of the rents and profits might perhaps be considered as an actual ouster, until 1807, but as all the parties here acted under a mistake, and not with any intention of working a disseisin, it can hardly be considered that *J. M. Dixon* was disseised, still less abated. For this *Litt.* sec. 396, *Williams* v. *Thomas* (*a*), *Doe* v. *Perkins* (*b*), *Jarret* v. *Weare* (*c*), and *Hall* v. *Doe* (*d*), are authorities. It follows therefore that the defendant's father was seised in fact at the time of *Lucy Dixon's* death. The defendant himself takes *Simeons Onset* by descent, and he is liable to discharge this bond out of assets thus coming to his hands.

(*a*) 12 East, 141.
(*b*) 3 M. and S. 271.
(*c*) 3 Price, 575.
(*d*) Ante vol. i. 340.

Tindal, contrà. Taking the whole of the facts found in this case together, it cannot be held, that *J. M. Dixon*, the obligor of this bond, had such a seisin of the estate in question, as to make it descendible from him to the defendant. *Lucy Dixon*, the person last seised, died in 1797, and her heir at law, the obligor, died in 1815. It is also admitted on both sides, that *J. M. Dixon* never had any actual enjoyment of the profits of the estate during the whole of his life. The case on the contrary finds that at the time of the death of *Lucy Dixon*, the estate in question was in the possession of a tenant from year to year at one entire rent, and that from the time of her death, her daughter *Ann*, and *John Milbourn* her husband, received the rents until 1801, when *Ann* died, and that *John Milbourn* then received the rents until *Whitsuntide*, 1815, claiming to hold as tenant by the courtesy. Now there cannot be a more unequivocal act than that to shew an assertion of title, because unless *Ann Milbourn* had the fee, her husband could not be tenant by the courtesy. But it is contended on the other side, that notwithstanding that circumstance, *J. M. Dixon* (although he died on the 27th *April* in the same year) was still seised in *fact*, so as to give the estate to the defendant by descent. The authorities, however, cited for that proposition, are insufficient for the purpose. In the passage cited from *Co. Lit.* 15 *a*, Lord *Coke* speaks of the son "dying before entry or receipt of rent." Stopping there, it is clear that what was passing in Lord *Coke's* mind must have been, that if there had been rent due or rent received from the tenant, it would be rent due to the eldest son, for he would not have made that distinction of "dying before entry or receipt of rent," unless he contemplated the possibility of a receipt of rent by the son, *surviving* at that time. But this is not a case falling within the description alluded to by Lord *Coke*. This is not a case where the son died before the rent became due, nor is it a case where he has died before the termination of the term, but it is a case in which he has outlived the term, and in which the party who has

1824.

Bushby
v.
Dixon.

received the rents, has actually denied his title. It is an admitted fact here, that the rent was received by another person, who claimed title to receive them as devisee, under the will of *Lucy Dixon*, and, therefore, it is not a case like that referred to by Lord *Coke*, who is clearly speaking of a case in which there is no denial of title. The case cited from *Jenkins's Cent.* pl. 25, p. 242, for the position that an entry by a devisee may be considered as an entry for the benefit of the heir at law, is inapplicable to this case, because there was no adverse claim of title. *Goodtitle* v. *Newman* is also irrelevant, because there it was merely held, that an actual entry by a guardian in socage, was to be considered for the benefit of the daughter, so as to give her an actual seisin and a possessio fratris. It must be made out on the other side, that a person who is kept out of possession of the estate by an agreement between him and the tenant, during his whole life, has still the freehold in him in fact. Now suppose the present defendant had claimed the lands in question in a real action, as heir of his father, could he say that his father was seised by taking the esplees? There are two or three authorities to shew that in reason and good sense, this is a conclusion to which the Court cannot arrive. According to the definition given in *Com. Dig. tit. Abatement*, (A. 1.) an abatement is where a person dies seised, and another enters without right before the heir, and in *Co. Lit.* 277 *a*, it is said that an abator is he who takes away the freehold in law, which has descended to the heir. Now this is clearly an abatement. Here it appears that the daughter of *Lucy Dixon* had entered and received the rents, having claimed to hold the freehold, and kept the heir at law out of possession during his life. Therefore, this case comes immediately within the proposition laid down by Lord *Coke*. Then was the receipt of rent a disseisin? Certainly not. Undoubtedly if it had been the receipt of rent by a wrong doer it would not operate as a disseisin. But here is a voluntary payment without coercion, and according to *Roll. Abr. tit. Disseisin*

(C.) pl. 8, and *Bro. Abr. tit Disseisin*, pl. 96, such a payment would operate as a disseisin at the election of the party. But assuming this not to be a disseisin yet it is clearly an abatement. It must be admitted that if the obligor of this bond, being heir at law of *Lucy Dixon*, had received the rent so as to be in the actual seisin of the premises, this would operate as a disseisin of the heir at law. But that not being the case, then the position in *Co. Lit.* clearly shews that the estate here is devested out of the defendant. The Court must look to the intention of the parties and to the real state of the facts in the case. Here is an intention on the part of the testator to leave the estate to her daughter, the devisee. There is an intention manifested on the part of the devisee to claim the freehold. She receives the rents and leaves the estate to another person, and afterwards upon her husband's death, the rents are received by the latter, and during his life the heir at law is kept out of the possession. This is an enjoyment of the freehold by a person who had a right to enter before the heir at law. Therefore this is clearly an abatement, for there is no actual disseisin by the heir. On these grounds it is contended that this is an abatement, and that there is no actual seisin in the heir at law, so as to constitute this estate assets in the defendant's hands.

ABBOTT, C. J. I am of opinion that the verdict must be entered for the plaintiff. It is clear that if the obligor was ever seised in fact, although but for a very short time, the defendant, who is now in possession of the land, has it by descent from him, and the length of time during which the obligor is seised is immaterial. It is equally clear that a seisin to charge the defendant as heir must be a seisin in fact, and not one merely in law. What entry will make a possessio fratris so as to charge the defendant as heir is distinctly laid down in *Co. Lit.* 15 *a*, where it is said "If the father maketh a lease for years, and the lessee entereth and dieth, (i. e. the father,) the eldest son dieth during

1824. Busby v. Dixon.

the term, before entry or receipt of rent, the younger son of the half blood shall not inherit, but the sister; because the possession of the lessee for years is the possession of the eldest son, so as he is actually seised of the fee simple, and consequently the sister of the whole blood is to be heir." The doctrine there laid down is, that inasmuch as the heir cannot by law make an actual entry upon the land, and if he does he will be a trespasser, it shall not be necessary for him to make an actual entry, but if he dies before receipt of rent, his sister shall be heir, for he is in that case seised in deed. That goes to shew that the possession of a tenant for years, (and a tenant from year to year is to be considered a lessee for years for this purpose,) being a rightful possession, and such as the heir cannot disturb, is to be considered in law as the possession of the heir himself, so as to constitute a seisin in fact. Without entering into the question of disseisin, I think, on the authority of what is laid down in *Co. Lit.* that the obligor in this case was for a time seised in fact, and consequently the defendant, who has the land by descent from him, is chargeable with the payment of this bond.

Bayley, J.—The justice of the case is clearly against the defendant, for either as heir of *Lucy Dixon* or of his father he would be liable to pay this bond. But that does not entitle us to give judgment against him unless we are satisfied that he is rightly chargeable in the character of heir of *J. M. Dixon*. To make him heir of *J. M. Dixon*, we must be satisfied that the latter had a seisin, not merely in law, but in fact. At the time when *Lucy Dixon*, the ancestor, died, the land was in the occupation of a lessee, and that lessee, immediately on the death of the tenant, continued in the possession of the estate, and continued to take from time to time the esplees, and it seems to me (though I was not clear upon the subject when the point came first to be discussed) that the taking of the esplees by the tenant in possession is a taking for the person who is seised in law of the freehold. It is laid down in *Com. Dig. tit. Descent,*

1824.
Bushby
v.
Dixon.

[D.] that if land be let on lease for years, the possession of the lessee is the possession of the heir. In addition to that there are many other authorities to the same effect. But in *Ratcliffe's* case (*a*), which is the case of two brothers of different venters, it is said, "if the elder brother enters and by his own act hath gained the actual possession, or if the lands were leased for years, or in the hands of a guardian, and the lessee or guardian possessed the land, there the possession of the lessee or guardian doth vest the actual fee and freehold in the elder brother." It is true that where there is no person in possession at the death of the ancestor, there must be an actual possession by the heir at law, to give him seisin in deed; but if there is a person entitled to the actual possession in the character of tenant, and that person remains in possession, it seems to me, that immediately upon the death of the ancestor the possession of the tenant is the possession of the heir at law, and that the heir is as much at that time in possession as if the possession had been vacated, and he had immediately entered upon it at the death of the ancestor. The misconduct of the tenant in paying the rent to a person who had no right to receive it, or the misapprehension of the heir at law in suffering the rent to be paid to a person who had no title, does not by relation destroy that seisin which is produced in the heir at law, by the person who holds in the character of lessee. I am, therefore, of opinion, that this was a seisin in fact by the heir at law of *J. M. Dixon*, so as to make him within the words of the replication, the person taking the land by descent from his father, so as to make him liable on this bond.

Holroyd, J.—I am also of opinion that the defendant is liable to the payment of this bond as heir of his father, having received lands from him in consequence of that, which amounts to a seisin in fact, in construction of law. Lord *Coke* puts the two cases of a man dying

(*a*) 3 Rep. 42, a.

1824.

BUSHBY v. DIXON.

seised, when he is himself in the actual possession of the land, and of land in the possession of a tenant for years, or from year to year. If the person seised is in possession himself, the freehold descends upon his heir, and the latter, without any entry, is immediately seised, and has a seisin in law, though not a seisin in fact. In *Co. Lit.* 277 *a*, Lord *Coke*, in speaking of an abator, says, "Abate is both an *English* and *French* word, and signifieth, in its proper sense, to diminish or take away, as here by his entering he diminishes and taketh away the freehold, in law descended to the heir." So that if a man die seised of land of which he himself is in the actual possession, if the heir does not enter but another person comes in and does that act, which the heir would have done, that would be an abatement, but still the heir would be seised in law; and therefore, to constitute a disseisin, there must be a disseisin in fact, for Lord *Coke* again says, "A disseisin is a wrongful putting out of him that is *actually* seised of a freehold. An abatement is when a man died seised of an estate of inheritance, and between the death and the entry of the heir an estranger doth interpose himself and abate." In order therefore to constitute a disseisin, there must be a disseisin in fact by actual entry. Lord *Coke* (*a*) again says, that if the ancestor leases for years, and dies, the possession of the lessee for years maketh an actual freehold in the eldest son. He there puts the case of an ancestor dying seised of lands in the possession of a tenant for years, on a different footing from the case where he dies seised and there is no tenant; for in the former the ancestor has such a seisin as that his heir can claim the land by descent from him. Suppose the obligor in this case had died, it is clear, according to what Lord *Coke* says, that there was such a seisin as would have given to the son of the whole blood, instead of a brother of the half blood, unless there is a difference between his dying before the term is out, instead of dying afterwards. I think, in point of law, that as there was an actual seisin in *J. M.*

(*a*) Co. Lit. 243 *a*.

Dixon, that seisin is not defeated by his neglecting to receive the rents and profits, or by the refusal of the tenant to pay him the rents and profits, because the tenant takes under an obligation to pay him of whom he holds, and therefore I think the lessee cannot say that he received the esplees for any body else after the lessor's death. It appears to me, therefore, that the defendant must claim the land in question as heir at law to his father, and not by descent from *Lucy Dixon*, and having land by descent in that right, I am of opinion that there was such a seisin in fact as makes him liable to the payment of this bond.

LITTLEDALE, J.—I am also of opinion that the plaintiffs in this case are entitled to recover. If the obligor was once seised or the seisin once attached in fact, then, I apprehend, the present defendant takes the land by descent from his father. The moment *Lucy Dixon* died, the defendant's father became seised in point of fact, and not in point of law. It is true that at that time, the land was on lease, but a possession by a tenant for years is the possession of the person who is entitled to the freehold. In the old entries of pleadings in real actions, no notice is ever taken of a tenant for years. In claiming a real estate by descent, it is never noticed that the party claims the land subject to a lease for years, because a lease for years is never considered as in any way deserving notice. In former times the lessee would have been considered as acting in the character of agent, bailiff or servant, of the person entitled to the freehold, and as receiving the rents and profits for his benefit. It is said here, that the fact of the rent being paid to a third person makes a difference; but I do not agree in that, because the payment of rent is merely a matter arising from the contract between the lessor and the lessee. The payment of rent is not necessary to shew that the person entered upon the land. He may enter merely to see if any waste has been committed, or for other collateral purposes, but the payment of rent to a third person

1824.

Busнву *v.* Dixon.

only goes to shew, that the relation of landlord and tenant continues between the lessor and the lessee. I think the possession of the lessee, though no rent was paid to the obligor, is a seisin in fact in the heir, for at the moment of *Lucy Dixon's* death, the possession of the lessee was the possession of her heir. He was at that time seised in point of fact, and if once seised, it does not signify whether he was afterwards disseised or not. Then, having been once seised, he had such an interest as to enable his eldest son to take by descent.

Judgment for the plaintiff.

Parker *v.* Ramsbottom and others.

A. B. and *C.* being in partnership as bankers, *A.* advanced money to the bank by sales of stock, and took bonds for 18,000*l* from *B.* and *C.* separately, conditioned for replacing 9,000*l.* stock each. The stock was not replaced, and *A* brought actions on the bonds and recovered judgments. *A.* withdrew from the bank, being then a creditor for 20,000*l.* stock, which *B.* and *C.*, by the deed of dissolution, agreed to replace by four instalments, covenanting that if they made default therein, *A.* might proceed on the judgments, and that he should have a lien on certain securities, both for that debt, and as an indemnity against the partnership debts, which they agreed to pay. *B.* and *C.* replaced the first instalment when due, but made default in the second. A written agreement, not under seal, was then made, that the debt should be treated as a loan of money from the first, and that the proceeds of the 15,000*l.* stock then due, being 10,083*l.* should be the debt, and should be repaid at a subsequent time, with legal interest. When that agreement was made, the 15,000*l.* stock was worth only 8437*l.* Before any part of the 10,033*l.* was paid, *B.* and *C.* became bankrupts, and at the date of the commission, two out of the three remaining days, named in the deed of dissolution for replacing the stock, were past. After *A.* left the bank, he paid some of the old partnership debts. While he remained in the bank he received the full interest upon his advances, without deducting the property tax:—Held, first, that the second agreement was usurious and void, but that the deed of dissolution was valid and binding; that *A.* might prove under the commission against *B.* and *C.* for the 15,000*l.* stock, the value of the two instalments, due before the bankruptcy, to be estimated by the price of stocks on the days when they became due, and the value of the third by the price of stocks on the day of the date of the commission, with a rebate for the interval between that day and the day when that instalment would have become due. Second, that *A.* had still a lien upon the securities mentioned in the deed of dissolution. Third, that *A.* might prove for such of the old partnership debts as he had paid. And fourth, that the property tax allowed to *A.* could not be deducted from the sum to be proved by him, it not appearing that *B.* and *C.* had accounted to government for it.

In this case the Lord Chancellor had directed a feigned issue, to try two questions; first, whether the plaintiff was by law entitled to prove any and what debt under a commission of bankrupt, dated 29th *March*, 1819, awarded against *Edward Penfold*, *John Springett*, and *William Margeson*

Penfold; and second, whether, as respected any debt proveable under such commission, the plaintiff had by law any lien upon any and which of certain securities enumerated in a schedule annexed to a certain indenture, dated on or about the 13th *July*, 1814, and made between the plaintiff of the first part, *John Springett* of the second part, and *Edward Penfold* of the third part; namely, a mortgage deed from *William Elgar*, of *Maidstone*, in the county of *Kent*, to *R. Parker*, *J. Springett*, and *E. Penfold*, for securing the sum of 10,000*l.* and interest thereon; and a bond from the Earl of *Romney*, and a promissory note from *William Archer*, of *Maidstone*, to the same persons, for securing the sum of 1,000*l.* and interest thereon. The declaration alleged, first, that the plaintiff was legally entitled to prove a debt, to wit, the sum of 30,000*l.*, under the commission; and second, that as respected the said debt, the plaintiff had a legal lien upon all the said securities. The pleas negatived those allegations, and the replications took issue upon the pleas. At the trial before *Abbott*, C. J., at the adjourned *Middlesex* Sittings after *Easter* Term, 1823, the plaintiff recovered a verdict upon both the issues, subject to the opinion of the Court upon the following case:

The plaintiff, in *December*, 1787, entered into partnership with *E. Penfold* and *J. Springett*, as bankers, in *Maidstone*, in the county of *Kent*, for a term of twenty-one years, which expired on the 31st *December*, 1808. In *January*, 1809, an agreement was entered into between the partners to continue the partnership for a further term of seven years, upon the same terms as before, except that the plaintiff should, instead of an equal division of the profits, receive one tenth of the profits beyond the other partners. By this agreement it was settled that the plaintiff should receive four tenths of the profits of the concern, *E. Penfold* three tenths, and *J. Springett* the remaining three tenths. In the course of the year 1810, it became necessary that advances should be made to the bank, and on the 17th *July* in that year, the plaintiff advanced to the bank, for the use of the partnership,

1824.
PARKER
v.
RAMSBOTTOM.

the proceeds of a sum of 30,000*l.* 3 per cent. consols., and subsequently a further sum of 18,200*l.* of the same stock. Before the 1st *January*, 1813, by various repayments to the plaintiff, the advances were reduced to 30,000*l.* 3 per cent. consols., and on that day *E. Penfold* and *J. Springett* made and executed two several bonds to the plaintiff in the penal sum of 18,000*l.* each. The condition annexed to each was the same, with the change only in the names of the obligors, and was for the replacing of 9,000*l.* 3 per cent. consols. on or before the 1st *January*, 1814, and payment of the dividends by way of interest in the mean time. In *October*, 1813, the sum of 10,000*l.* 3 per cent. consols. was re-invested in the plaintiff's name out of the funds of the bank. After the sum of 30,000*l.* 3 per cent. consols. was advanced as aforesaid, the plaintiff insisted upon receiving payments equal to the dividends without any deduction of the property tax, and he always afterwards had credit in his private account for an amount equal to the dividends, without any deduction of the property tax upon all the stock remaining due, down to the period of the dissolution of partnership hereinafter mentioned. He had also credit in his said account, with his privity, for interest upon the said payments from the time when such dividends became due until the same were paid. Interest was not allowed to the customers of the bank, unless they left it for a given period, and then only on a special agreement. The stock mentioned in the conditions of the bonds was not replaced according to the terms of the condition, namely, on the 1st *January*, 1814, on which day the market price of the stock was 61⅝, whereby the bonds became forfeited; and in *Easter* Term, 1814, the plaintiff signed judgment in two several actions which had been brought by him in *Hilary* Vacation in the Court of King's Bench upon the two bonds. On the 5th *July*, 1814, the partnership between the plaintiff and *E. Penfold* and *J. Springett* was dissolved, by the plaintiff withdrawing himself from the concern; and on the 13th of the same month a deed of dissolution of copartnership between the said par-

1824.
PARKER v. RAMSBOTTOM.

ties was executed by them. This deed began by reciting that the parties had carried on the business of bankers under articles of partnership, by which the plaintiff was entitled to four tenths and each of the others to three tenths of the concern; that the plaintiff had advanced large sums for the use of the concern; and that *J. Springett* and *E. Penfold* had, by their respective bonds, secured the re-transfer to the plaintiff of 9,000*l.* and 9,000*l.* 3 per cent. consols. on the 1st *January*, 1814, with the dividends; and that those sums not being re-transferred at the day fixed, the plaintiff had commenced actions and recovered judgments on those bonds; that the several sums of 9,000*l.* and 9,000*l.* 3 per cent. consols. had not been replaced; and that the further sum of 2,000*l.* like annuities was also due to the plaintiff; that 1,139*l.* was standing to the plaintiff's credit in the partnership books, under the head of profit and loss; and that he had agreed to assign to *E. Penfold* his share in the concern and the said sum of 1,139*l.*, upon having such indemnity against the partnership debts, and such security for the re-transfer of the several sums of 9,000*l.*, 9,000*l.* and 2,000*l.* stock, as hereinafter mentioned. The deed contained an assignment by the plaintiff to *E. Penfold*, of the sum of 1,139*l.* and his share in the concern, and covenants by *J. Springett* and *E. Penfold* to pay the partnership debts and indemnify the plaintiff against them; and they further covenanted that the several sums of 9,000*l.*, and 9,000*l.*, and 2,000*l.* 3 per cent. consols. and the interest and dividends, should be transferred and paid to the plaintiff by four equal instalments, on the 5th *January* and the 5th *July*, in the years 1815 and 1816; and that, if default should be made in payment of the said sums or any part thereof, it should be lawful for the plaintiff to proceed in the actions before mentioned, without reviving the judgments. They also covenanted that certain securities specified in a schedule thereunder written, (being the same that were mentioned in the issue,) should, together with the monies payable in respect of them, be retained by the plaintiff for two years, as an indemnity against

1824. PARKER v. RAMSBOTTOM.

partnership debts, and should also be retained until the whole of the said sums of 9,000*l.*, 9,000*l.* and 2,000*l.*, 3 per cent. consols. and dividends should be paid. The dissolution of partnership was proposed by the plaintiff. At that time the bank had sustained considerable losses; for two or three years before no profits had been divided, but the whole of such profits had, at the suggestion of the plaintiff, been carried to a fund, called the reserve fund, to pay off the losses; and at the time of the proposal for and of the dissolution, the concern was known by both parties to be insolvent as a separate establishment, and was believed by both to be deficient to the amount of 7,000*l.*, although as to the public it was solvent, because the plaintiff and the defendant, *E. Penfold*, had both considerable private property. After the plaintiff had thus retired from the partnership, *E. Penfold* and *J. Springett* admitted *W. M. Penfold*, a son of the former, as partner in the concern, and they together continued the banking business until their failure and bankruptcy as hereinafter mentioned. The first instalment of 5000*l.* 3 per cent. consols. was paid under the deed of dissolution, but the second instalment not having been paid according to the terms of that deed, a negotiation took place between *E. Penfold*, and *J. Springett*, and the plaintiff, upon the subject of such default, and on the 6th *September*, 1815, the following agreement was entered into between the plaintiff and the said *E. Penfold* and *J. Springett*: "Memorandum, this 6th day of *September*, 1816, that it is agreed between *R. Parker* and *E. Penfold*, on behalf of themselves and copartners in the *Kentish* bank, with reference to their articles of separation, in regard to the replacing of stock therein mentioned belonging to Mr. *Parker*, that the second instalment, which should have been replaced in *July* last, of 5,000*l.*, and the two future instalments of 5,000*l.* each, shall be accounted for in money at the price originally sold out, and the said *E. Penfold* and Co. released from the replacing thereof, and that they shall pay to *R. Parker* interest at 5 per cent. half yearly, on the 5th *January* and 5th *July*

every year, until the principal and all interest shall have been repaid. *Parker* is to retain all the securities now held by him, except *Archer's* note of 1,000*l.*, and a tan-yard and premises adjoining, contained in lot second of particulars of sale of *Elgar's* premises, of 28th *July*, 1814, in lieu of which a bond is to be forthwith made and executed by *E. Penfold* to *R. Parker*, to make good any deficiency at the final payment and closing of this account between them. In consideration of the circumstances and for the accommodation of the *Kentish* bank, *R. Parker* agrees to postpone the payment of the debt, namely, 5,041*l.* 17*s.* 6*d.*, one half part thereof until the 5th *July*, 1818, and the second half part, with all interest due thereon, until the 5th *July*, 1820. The amount of the 15,000*l.* consols. at the price sold out, is agreed to be in money 10,083*l.* 15*s.* In case any part of these securities should be sold, the produce is to be paid to Mr. *Parker*, on account and in reduction of the within instalments." On the 17th *July*, 1810, at which time the stock was sold out, the market price was 67¼, making the proceeds 10,083*l.* 15*s.* On the 6th *September*, 1815, the market price was 56¼, making the proceeds or value of the stock at that date 8437*l.* 10*s.* Under and in pursuance of this agreement the plaintiff gave up to *E. Penfold* and *J. Springett* the promissory note of *Archer* for 1,000*l.* mentioned in the schedule to the deed of dissolution, and also his security upon the tan-yard and premises adjoining, mentioned in the memorandum of agreement; and in like performance of the said agreement, on the 16th *October*, 1815, *E. Penfold* and *J. Springett* executed a joint and several bond to the plaintiff, in the penal sum of 10,000*l.*, conditioned for the payment by them, or either of them, to the plaintiff, on the 6th *July*, 1820, of all such part and so much of the said debt or sum of 10,083*l.* 15*s.*, and interest, at the rate of 5 per cent. per annum, on the 6th *July*, 1820, as should then remain due and owing to the plaintiff, the money to be ultimately recoverable thereon, being limited not to exceed the sum of 5,000*l.*

1824. PARKER v. RAMSBOTTOM.

On the 10th *October*, 1815, the market price of stock was 58½. On the 29th *March*, 1816, a commission of bankrupt issued against *E. Penfold*, *J. Springett*, and *W. M. Penfold*, under which they were found and declared bankrupts; and the defendants in this case were chosen assignees under the commission. At the time of the bankruptcy several of the debts which were due from the partnership of the plaintiff and *E. Penfold* and *J. Springett*, and which *E. Penfold* and *J. Springett* had covenanted by the deed of dissolution to pay, remained unpaid, and the plaintiff, since the bankruptcy, has paid some of them. The amount of the property tax upon the dividends of the stock remaining due, for which dividends the plaintiff had credit, without allowing a deduction of property tax, was 261*l.* 18*s.* on the 1st *January*, 1813; 411*l.* 18*s.* on the 5th *July*, 1814; and on the 6th *September*, 1815, and at the time of the bankruptcy, 464*l.* 8*s.*

Tindal, for the plaintiff. First, the plaintiff is legally entitled to prove his debt under the commission of bankrupt issued against the two persons who continued partners in the concern at the time of the dissolution; and that debt must be calculated with reference to the agreement of the 6th *September*, 1815. Second, if the agreement cannot be supported in point of law, the plaintiff may revert to the deed of dissolution, and may prove his debt to the amount appearing due on the face of that deed. It will be contended that the agreement is void for usury, but the situation of the parties and the nature of the transaction will negative that objection. According to the deed of dissolution the stock was to be replaced by four different instalments, on four different days, one of which was replaced accordingly. The period for the payment of the second instalment had arrived, and that sum was over due, before the agreement of the 6th *September* was made, and as the price of the stock had then fallen, the plaintiff consented either to take back his stock and abide by the then loss, or to take the original

value of the stock at a future day, allowing by those means to the bankrupts the chance of the benefit accruing from a rise in the price of the stock. By such an arrangement the borrower might have received, and the lender might have renounced, a very considerable advantage, and it is a leading rule of law upon this subject, that in all cases of loans where the principal is put in hazard, the contract is not usurious, even though more than the legal interest is reserved. *Button* v. *Downham* (*a*). Here, part of the principal sum originally owing to the plaintiff was put in hazard, because he might ultimately have received less under the agreement than under the deed of dissolution; this therefore, like the contract in *Maddock* v. *Rumball* (*b*), is not usury, because the amount of the sum to be paid depended upon a contingency; neither is it within the stockjobbing act (*c*), an objection which was also raised and overruled in that case. It will be said that *Boldero* v. *Jackson* (*d*) is an authority to shew that this agreement is usurious, but the cases are by no means parallel. In that case there was no contingency to happen, and no interval of time to elapse, but the contract was complete from the first; here the contract was incomplete, and there was both a contingency and an interval of time, for the borrowers were to have the chance of the advantage to be gained by a rise of stocks during the period of eighteen months. Then second, even if the agreement is usurious and therefore void, still the plaintiff may revert to the deed of dissolution, and recover the debt owing to him under that contract, because the usury extends only to the agreement to pay more than legal interest, and does not affect the original debt, if that debt were lawfully contracted. *Com. Dig. Usury.* [B]. *Pollard* v. *Scholey* (*e*) and *Ferrall* v. *Shaen* (*f*). The plaintiff therefore is clearly entitled to prove under the commission the amount of all the instalments that came due before the date of the commission;

(*a*) Cro. Eliz. 643.
(*b*) 8 East, 304.
(*c*) 7 G. 2. c. 8.
(*d*) 11 East, 612.
(*e*) Cro. Eliz. 20
(*f*) 1 Saund. 294.

1824.
Parker
v.
Ramsbottom.

for the distinction taken by Lord *Kenyon* in *Utterson* v. *Vernon* (*a*) applies strictly to this case; "where it is perfectly contingent whether or not a debt will become due, or where the demand arises on account of some tortious act, in neither of those cases can the debt be proved. But the rule with regard to demands payable at all events on a future day, though the amount of them is uncertain, falls under a different consideration." Further, it would seem, upon the authority of Ex-parte *King* (*b*), that the plaintiff is entitled to prove for the amount of the fourth instalment, although it had not become payable when the commission issued; because he had originally received bonds conditioned for the retransfer of all the stock, and had recovered judgments upon them; and the deed of dissolution expressly empowers him, in case of default in the retransfer, to proceed upon the judgments without reviving them. Lastly, the plaintiff is entitled to prove the amount of those original partnership debts, which he has been called upon to pay since the bankruptcy. The only remaining question is, whether the plaintiff's claim is to be diminished by the deduction of the property tax; but there seems no ground for that objection, first, because it does not appear that the amount of property tax allowed the plaintiff was ever paid over by the bankrupts to government; and second, because by the few decided cases to be found upon this subject, it seems, that the amount of property tax so allowed cannot be recovered by or set off in answer to an action. *Wigg* v. *Shuttleworth* (*c*), *Fuller* v. *Abbott* (*d*), *Gabell* v. *Shevell* (*e*), and *Andrew* v. *Hancock* (*f*). The question of lien it is unnecessary to argue, because it is included in and must depend upon the first two questions. If the agreement of *September*, 1815, is void, and the previous deed of dissolution is valid, the plaintiff clearly has a legal lien upon all the securities which are enumerated in the schedule annexed to that deed.

(*a*) 3 T. R. 539. 4 Id. 570.
(*b*) 8 Ves. jun. 334.
(*c*) 13 East, 87.
(*d*) 4 Taunt. 105.
(*e*) 5 Id. 81.
(*f*) 3 J. B. Moore, 278.

1824.

PARKER
v.
RAMSBOTTOM.

Parke, contrà. First, the plaintiff has no right to prove any debt under the commission, beyond the amount of the old partnership debts paid by him since the commission issued, and consequently he can have no lien beyond the amount of those debts. Second, the agreement of *September*, 1815, is void for usury, and the plaintiff cannot revert to the prior deed of dissolution, even if that was a legal and binding instrument, because that was satisfied by and merged in the subsequent agreement. Third, the deed of dissolution is an invalid and illegal instrument, having been made in direct fraud of the other creditors, inasmuch as both parties at the time when they made it knew that the concern was insolvent. And fourth, the plaintiff's claim, whatever it may be, must be subject to the deduction of the amount of property tax. The agreement of *September*, 1815, was clearly usurious. One of the four instalments had then been paid; another was then over due; and the remaining two were to become payable at future periods. The debt legally due to the plaintiff at the date of the agreement was the then market price of the stock, namely, 8437*l.* 10*s.*; but the sum secured to him by the agreement was the market price of the stock as originally sold out, namely, 10,083*l.* 15*s.* and interest thereon. That therefore was a money debt, to be forborne, and the bargain was the same as if the value of the stock had been then lent, and more was to be afterwards paid for it than the principal and legal interest. The parties were in the same situation as if the stock had been replaced and then sold out again for the purpose of a loan of the produce, which would most clearly have been an illegal contract for the forbearance of money, upon the consideration of receiving more than the principal and legal interest. The plaintiff took an indemnity for a loss already sustained by a fall in the price of stocks, upon the consideration of the future forbearance of the money; or he was in substance making a loan of stock, upon an agreement that it should be returned at something above the market price. Now in any of these views of the case, the bargain was

1824.

PARKER v. RAMSBOTTOM.

usurious, and *Moore* v. *Battie* (*a*), *Doe* v. *Barnard* (*b*), and *Boldero* v. *Jackson* (*c*), are express authorities for so holding. Then the agreement of *September*, 1815, being void, the former deed of dissolution is, under the circumstances of this case, void also. Undoubtedly there are cases to shew that where there is a subsisting legal debt, a subsequent agreement to receive usurious interest will not extinguish the original debt. *Regina* v. *Savell* (*d*), *Gray* v. *Fowler* (*e*), and *Pollard* v. *Scholey* (*f*). But that rule applies only where the nature of the original debt is unchanged, as it was in all the cases cited. [*Abbott*, C. J. Could the second agreement be pleaded in bar of an action of covenant upon the deed of dissolution? Would not that be pleading merely accord, without satisfaction, to an action upon a specialty?] Such a plea would be good. The second agreement amounted to an accord *and* satisfaction; it changed the nature of the original debt, and converted that which was a stock transaction into a money loan. The original debt therefore sinks with the second agreement. *Israel* v. *Douglas* (*g*), *Wade* v. *Wilson* (*h*), *Hollingworth* v. *Parkhurst* (*i*), and *Dobson* v. *Lockhart* (*k*). [*Abbott*, C. J. Those are not cases where a new security was taken from the original debtor, but where the debtor was changed, and a new security taken from a third person.—*Bayley*, J. How can this be called a loan of money? Suppose the plaintiff had received the whole amount of 10,083*l*. 15*s*., and an action had been brought against him for usury, how would you have described the money lent? Could you truly state that there was a debt of any specific sum of money?] The value of the stock was money lent, and might have been truly described as the debt forborne. Even if the second agreement cannot, according to strict legal technicality, be

(*a*) Ambler, 371.
(*b*) 1 Esp. 11.
(*c*) 11 East, 612.
(*d*) 7 Mod. 118.
(*e*) 1 H. Bl. 462.
(*f*) Cro. Eliz. 20.
(*g*) 1 H. Bl. 239.
(*h*) 1 East, 195.
(*i*) Noy, 2.
(*k*) 5 T. R. 133.

1824.

PARKER v. RAMSBOTTOM.

called a satisfaction of the deed of dissolution, in equity it clearly operated as such, and that is a sufficient ground for saying, that the plaintiff cannot prove under the commission. Then, it is quite clear that he cannot be entitled to prove for the instalment which had not become due at the time of the bankruptcy, nor has any authority been produced for holding that he can prove for the others: and at all events the sums payable in respect of the property tax must be deducted from the plaintiff's claim, for to them he cannot possibly be entitled. Besides, as against the creditors of the partnership, the deed of dissolution is plainly void; the parties were perfectly well aware that the concern was insolvent when the deed was made: it was therefore a fraudulent preference of one creditor to the injury of the rest. The plaintiff had no right to change his character from that of a partner into that of a creditor in fraud of other persons, and as the deed therefore is void as against the creditors, that objection may be raised by the assignees. *Anderson* v. *Maltby* (a).

Abbott, C. J.—I am of opinion that the plaintiff is entitled to prove under the commission of bankrupt issued against his late partners *E. Penfold*, and *Springett*, and *W M. Penfold*, and consequently that he has a lien upon the several securities enumerated in the case. It appears to me that the agreement of the 5th of *September*, 1815, is clearly void for usury, because it secures to the plaintiff the sum of 10,083*l.* 15*s.*, as the value of the stock then remaining to be replaced, though the real value of that stock was then only 8437*l.* 10*s.*; and because the difference between those two sums was evidently to be taken as the consideration for the forbearance of the debt. But I am also of opinion, upon the authority of decided cases, that the effect of avoiding the agreement is to revive the deed of dissolution, which was lawful in itself, and to render it valid and binding upon the parties. That has been held to

(a) 4 Bro. Ch. C. 423. 2 Ves. jun. 244. S. C.

1824.
Parker v. Ramsbottom.

be the law with respect to goods and money lent, and I cannot distinguish in this respect between a loan of money and a loan of stock. Then the question is, to what extent the plaintiff is entitled to prove. If his title depended upon the deed of dissolution alone, he could have claimed to prove only for those instalments which were to have been paid before the bankruptcy; in such case he certainly could not have proved for those which remained to be paid at future periods. But previous to the execution of the deed of dissolution, two bonds had been executed to the plaintiff of 9000*l.* each, as securities for the advances made by him, and upon them he had brought actions and recovered judgments. Now it is part of the provisions of the deed of dissolution, that if any default was made in the payment of the sums thereby secured, the plaintiff should be at liberty to proceed upon the judgments; and, therefore, he thus becomes entitled to the sum of 2000*l.* mentioned in the deed, and for which no previous provision had been made. The judgments then remaining as securities for the 15,000*l.* stock, the plaintiff is entitled to prove for that sum; for the value of the two instalments of 5000*l.* each, which should have been paid on days past before the date of the commission, their value to be estimated according to the market price of the stock on those days; for the value of the third instalment of 5000*l.* to be estimated according to the price of stock on the day the commission issued, with the rebate for the interval between that day and the day when that instalment should have been paid; and for the amount of the old partnership debts paid by him since the bankruptcy. With respect to the property tax, which is the only remaining point, there is so much obscurity in that section of the act which directs the deduction of it, and so long a period has elapsed since the payment of it, that I think we ought not to hold that the bankrupts can now recover money paid voluntarily and without objection by themselves, especially as they do not make it appear that they ever accounted to government for the money. If the deed of dissolution is not avoided by the

agreement of *September*, 1815, the plaintiff of course is not deprived by that agreement of his lien upon the securities enumerated in the schedule of the deed; and the argument that the deed is void for fraud is defeated by one fact found in the case, namely, that though the concern was insolvent as a separate establishment, it was, nevertheless, solvent as respected the public.

BAYLEY, J.—I entertain no doubt that the agreement of the 5th of *September*, 1815, was usurious, and consequently void. The statute 8 Ann. st. 2. c. 16. evidently applies to loans of goods, or any thing that can be called money's worth, as well as loans of money itself. In this case the original bargain was for the return of a loan of stock, which was a perfectly legal bargain; that stock, when first sold out, produced 10,083*l.* 15*s.*, but when the second bargain was made, it was worth only 8437*l.* 10*s.* therefore, at that time the plaintiff was lending a stock worth 8437*l.* 10*s.* only, and stipulating to be repaid by 10,083*l.* 15*s.*, with legal interest on that larger sum. That was certainly usurious, and then the question arises, whether that infected and so destroyed the former bargain. I am clearly of opinion that it did not, for there are many cases in which it has been decided, that a contract for usurious interest upon a previously subsisting debt does not deprive the creditor of his claim to that debt. It has been contended that we must consider the second agreement as changing the nature of the original transaction, and converting that which was a loan of stock into a loan of money, and that the case then stood the same as if the stock had been first replaced and then resold. But the fact certainly is not so, and we cannot intend any thing contrary to the facts found by the case, and then *Gray* v. *Fowler*, which was cited in argument, is a direct authority in favour of the plaintiff on this point. If the statutes of usury had never been passed, and the present plaintiff had brought an action upon the deed of dissolution, the bankrupts could not have pleaded the agreement in bar of that action; for though that would have

1824.

Parker v. Ramsbottom.

been an accord, it would not have amounted to satisfaction, and a plea of accord without satisfaction is a bad plea to an action upon a specialty. Then what is the debt secured by the deed of dissolution? It is a sum of 20,000*l.* stock, to be re-transferred to the plaintiff by instalments on four several days. One only of those instalments was paid, and, therefore, for the other three I have no doubt that the plaintiff is entitled to prove in the mode suggested by my Lord Chief Justice, as he is also for the partnership debts which he has paid since the bankruptcy. With respect to the property tax, if I were able to see clearly that the money paid to the plaintiff had previously paid the property tax, and that he was aware of that fact, I should, perhaps, think that the amount of the tax ought to be deducted from his claim, because then the debtor and the creditor would not stand in pari conditione, and it could scarcely be considered as a voluntary payment by the latter. That, however, does not appear, and, therefore, I concur in opinion with my Lord Chief Justice.

Holroyd, J. and Littledale, J. concurred.

Judgment for the plaintiff.

M. Petrie *v.* J. Bury and another, Executors of James Bury, deceased.

One of three joint covenantees for the payment of an annuity to *A.* cannot sue the executors of *B.*, the covenantor, upon a simple averment that the other covenantees did not at any time seal or deliver the indenture; for non constat but they may still execute the deed, and joint covenantees who *may* sue, *must* sue jointly, unless they have expressly disclaimed the covenant, which it lies upon the party suing to shew.

DECLARATION in covenant stated, that by a certain indenture purporting to be made between *James Bury* of the first part, *Patience Petrie* of the second part, and the plaintiff, *M. Petrie*, *T. Beddome*, and the defendant *John Bury*, of the third part, [which indenture sealed with the seal of *James Bury*, the plaintiff brought into Court, and averred that *T. Beddome* and *John Bury* did not at any time seal or deliver the said indenture,] reciting that a marriage was intended to be solemnized between *James Bury* and *Pa-*

1824.



PETRIE v. BURY.

tience Petrie, in consideration whereof, *James Bury* covenanted with the plaintiff, *Beddome* and *John Bury*, that in case the marriage took effect, and the said *Patience Petrie* should survive him, his heirs, executors or administrators, should pay to them the said plaintiff, *Beddome* and *John Bury*, an annuity of 200*l.* for the use of the said *Patience Petrie*. The declaration then averred that the marriage did take effect, that *Patience* survived her husband, and that she is still living, and that 250*l.* of the annuity is in arrear. Defendants craved oyer of, and set out the deed, and demurred for non joinder of parties. Joinder in demurrer.

Wightman, in support of the demurrer. It will hardly be disputed on the other side, that in all cases of joint covenants, it is necessary that all the covenantees should join in the action, nor will it be denied that the covenant in this case is joint, if the covenantees took a joint interest. As this is a joint covenant, primâ facie all the covenantees should have joined, and the question is, whether two of them having omitted to *execute* the deed, the plaintiff can sue without joining them in the action. This involves the question whether they *could* have joined, for if they *could* then they must. [*F. Pollock*, contrà, said that he must admit that they could have joined.] Then they must join; if not, great mischief and injustice may arise, inasmuch as all the covenantees would have a separate right of action. It cannot be denied that although all the covenantees may not have executed the indenture at present, yet still they may do so hereafter, and if so, a multiplicity of actions may be brought. Here is no averment of disclaimer on the part of the other covenantees, but merely a statement in fact that they did not execute. There is no necessity that covenantees should all execute at the same time with the covenantors. It may happen that neither of the other covenantees will execute, for there is no mutuality of covenants here, but non constat they will not execute. The

1824.
PETRIE v. BURY.

covenant is all on one side to pay an annuity to three persons for the use of a fourth. The plaintiff, therefore, by executing the deed alone, could not entitle himself to bring his separate action without joining the other covenantees who have a joint interest. This is analogous to the case of executors who must join even though they have renounced before the ordinary. *Hensloe's* case (*a*). If the covenantees here *might* have joined in the action, the case of *Clement* v. *Henley* (*b*) is in point to shew that they must join. But *Vernon* v. *Jeffrys* (*c*) is expressly in point. In that case the Court said, "If the other two did not seal the deed, the plaintiff might have helped it by averment; but here on the oyer we must take it they did seal. Besides, as they are named in the covenant as covenantees they might join in the action though they did not seal." It is true that in that case it does not appear that there was any averment that the parties not joined did not execute the deed, but that case was stronger than this, because there the covenant being in articles of partnership were mutual, whereas here there is no mutuality.

F. Pollock, contrà. If this action is not maintainable in the present form, the parties will have no legal remedy, and must be driven into a Court of equity. The cases cited on the other side, are rather in favour of, than against the plaintiff, because, they shew that an action may be maintained in the present form with proper averments. The case of *Clement* v. *Henley* was an action by all the covenantees, some of whom had not sealed, and the objection taken was that some had concurred in the action, who had not sealed. Now if it required a judgment of the Court so long since as the 18 *Car.* 1. that parties who had not sealed might concur in bringing the action, it affords a strong inference that up to that period at least, those who had not sealed might abstain from joining in the suit. In

(*a*) 9 Rep. 37.
(*b*) 2 Roll. Abr. Fait. F. pl. 2. l. 35.
(*c*) 2 Stra. 1146. 7 Mod. 358. S. C. See 1 Vent. 31. 1 Sid. 24.

Vernon v. *Jeffrys* it is laid down, that all the parties must be presumed to have sealed, unless the contrary is shewn. If it is ascertained that some of the covenantees did not seal, the Court say there, that for want of an averment that the others did not seal, it must be taken that they had all sealed, for a person who professes to be a party to an instrument must be presumed to have done every thing to give validity to his act. In *Clement* v. *Henley* the objection was, that certain parties had not sealed the instrument, but that objection was overruled, the Court saying that still they might concur in the action. It seems, therefore, to have been the opinion of the profession, at that time, that those alone who had sealed might have sued, leaving out the other covenantees, if it appeared that the latter had concurred. There is no decision in the books which says that a party who does *not* seal *must* seal. [*Bayley*, J. In the case of a bond, the obligees never seal.—*Abbott*, C. J. There are a great many settlements, and other conveyances, by which terms are created or assigned, and become vested in trustees, who never execute the conveyance. The interest and the term, nevertheless, pass to them]. Until assent, nothing passes by assignment, for till then there is nothing to bind the assignee. The question is, whether a person can be considered as becoming a party to an instrument, which professes to be under seal, until he actually seals it or does some other act expressing his adoption of it as a covenantee. It lies upon the other side to shew, that the parties who have not executed this deed have done some act to manifest their assent to it. If that is not done then it must be taken that they did not assent, and, therefore, it stands as a covenant with the plaintiff alone, and he may sue alone.

Wightman, in reply. No sufficient answer has been given on the other side to this objection. The Court must adhere to the general principle applicable to joint covenants. The great inconvenience arising from the breach

1824. PETRIE v. BURY.

of the general principle in this case is, that it will produce a multiplicity of actions. A covenant cannot be joint and several at the same time. It is argued on the other side that this is only a covenant with *Petrie,* inasmuch as there is nothing to shew that the other covenantees have assented. Admitting that to be so in fact, yet still there is nothing to prevent *Beddome* from executing the deed next week, and *Bury* the week afterwards, and then the covenantor might be liable to three several actions for the same identical breach, for *Beddome* and *Bury* might respectively say that they had never disclaimed (*a*). (Here the Court stopped him).

ABBOTT, C. J.—I am of opinion that the present action is not maintainable, and I regret that it is not, because the consequence will be that the widow must be put to further expense and delay, before she can enforce the payment of the money. The action is brought on a deed, made in contemplation of an intended marriage, and by that deed, the covenantor covenants with the plaintiff, and two other persons, for the payment of an annuity to them for the benefit of his widow, if she should survive him. The action being brought by one only of the three covenantees, it is alleged in the declaration in excuse for not having joined the other two, that those two did not or either of them seal the indenture. That is all that is alleged. Now it is clear from decided cases, that although a party does not seal the instrument, yet he may join in an action of covenant upon it with those who do. That point has been properly decided and is not controverted. The question is, whether if he *may,* he must join in the suit. We are not called upon to consider what might be the effect of an express renunciation, refusal, or disclaimer by the other two covenantees; for the declaration does not allege that either of them did renounce, refuse, or disclaim. All that it alleges is, that they did not seal the deed, but many persons assent to

(*a*) See Com. Dig. Tit. Fait. [C. 2.]



deeds though they do not execute. For instance, trustees very often assent to a trust, who never execute the trust deed, and it is not necessary that the assent should be given at the moment of the execution of the instrument. It is clear that the assent may be given at any time. Unless, therefore, it is alleged expressly that the other two covenantees had dissented, disclaimed or renounced, it appears to me that we must intend that they did assent, supposing their assent to be necessary to enable them to join in the action. Upon this short ground, namely, that dissent does not appear, and that assent must be presumed, I am of opinion that the action is not maintainable. I think the present case is analagous to that of executors under a will, who cannot sue alone, but must join in a suit, unless he who refuses to act, expressly renounces by some formal instrument. It was formerly the opinion of some persons, as appears from the recital of 21 *Hen.* 8. c. 4. that when an estate was devised to several trustees to sell, if any of them refused to concur in, or accept the trust, no sale could take place; to remedy which, that statute was passed; but it does not speak of the mere absence of assent, it expressly requires proof that they renounced or refused to act. From analogy to that case, I think it is not sufficient to state in the declaration, that the other covenantees did not seal the deed, but that if it was intended to rely upon the absence of their seal, more should have been alleged, namely, that they expressly dissented from it and renounced. What the effect of that may be we will not decide. It is sufficient for us to say, that no such express dissent or renunciation appears, and as they may join in the action I think they must.

Bayley, J.—I am of the same opinion. By this deed *James Bury* covenanted with the plaintiff, *Beddome*, and with *John Bury*, that he would pay the annuity to them for the benefit of his wife. The plaintiff sues alone without *Beddome* and *J. Bury*, and complains that the money is due and owing

1824.

Petrie v. Bury.

to him. Upon the face of the covenant the money ought to be in the hands of three, and there ought to be the security of three for its due application to the purpose intended; and it is a settled rule of law, that in all actions brought by joint covenantees, or joint obligees, or persons to whom a joint obligation is granted, all must concur in suing, and that an action brought by some only, out of the others, cannot be maintained, and it is an objection not in abatement, but in bar. That was decided by *Eyre*, C. J. in *Scott* v. *Godwin* (*a*). There an action was brought on a covenant by the assignees of the reversion. Upon demurrer it was objected that the covenant was by operation of law a covenant with two, and that one alone could not sue, and the Court decided, that in all cases the parties with whom a contract was made must join in the action. Now, therefore, in this case the plaintiff was wrong in suing alone, unless he has shewn a title by law, which gives him a right so to sue. Having sued alone it appears to me that the defendant has a right to say, "I never contracted with you alone; I never meant that you alone should be trusted with the money. I intended that the money should be entrusted to the possession of three, and, therefore, the suit ought to be in the names of those three. I have a right to the benefit that may result from having the action brought in the names of all instead of one, only." It may be beneficial in some respects to the defendants to have the action brought in the names of all the covenantees, because there may be circumstances which would be a complete bar if the action were brought in the names of three, but would not be so if brought in the name of one. I am quite clear that the plaintiff is not entitled to sue alone unless he has shewn a right upon the face of his declaration to sue alone upon a covenant, which purports on the face of it not to be with him alone, but with him and two others. Now the only thing he has done is to aver, that the other two covenantees did not

(*a*) 1 Bos. and Pul. 67.

sign the deed. The case which Mr. *Pollock* has cited shews that the mere neglect to execute the deed does not prevent the parties from being covenantees. They have a right to say that they are covenantees, and there would be no objection to their all concurring in the suit. They may consider themselves as being covenantees and they may assent, and unless it is shewn upon the face of the declaration that they have done something, by which their character of covenantees was destroyed, the plaintiff is not entitled to sue alone. I believe the only legal mode would be to summon the other parties, and get their dissent, and then the plaintiff would have a repudiation of their rights. Whether that repudiation would make a covenant to pay to three a covenant to pay to one, so as to give a right to that one to sue in his own name, I do not say; but at present the plaintiff's right to sue alone is not sufficiently made out.

HOLROYD, J.—I am also of opinion that the plaintiff is not entitled to sue alone on this covenant. The neglect of two of the covenantees to seal will not convert it into a covenant with one, so as to give that one the right to receive the whole of the money. It is manifest from the intention of the party covenanting that the money was to be received by three, but the non execution of the deed by the others will not convert it into a right for one only to sue; that is an old principle of law. The cases cited shew that all joint covenantees may sue though they have not executed the indenture, and if they may they must, unless dissent or disclaimer is shewn.

LITTLEDALE, J.—I am of the same opinon.

Judgment for the defendants on demurrer.

1824.



Doe, on the several demises of Benjamin Maddock and Jane Garratt, his wife, and Thomas Moore and Ann, his wife, *v.* John Lynes and Thomas Walker.

Termor assigns his estate to *A.* and *B.* in trust for certain purposes; and by another indenture, executed the next day, he *enfeoffs C.* and *D.* of the same lands upon certain other trusts:—Held, that the term assigned to *A.* and *B.* was not destroyed by the enfeoffment, there being no proof that they had assented to it.

Ejectment on the joint and several demises of *Benjamin Maddock* and *Jane Garratt*, alias *Jane*, his wife, and *Thomas Moore* and *Ann*, his wife, to recover a messuage and lands, called the *Brockeys*, in the parish of *Barwell*, in the county of *Leicester*. The defendant, *Lynes*, defended as the landlord, and the defendant *Walker* as the tenant in possession of the premises. At the trial before *Holroyd*, J. at the *Leicestershire* Summer Assizes, 1822, the plaintiff had a verdict, subject to the opinion of the Court upon the following case:

Jane Maddock, the wife of *Benjamin Maddock*, and *Ann Moore*, the wife of *Thomas Moore*, were the co-heiresses of *T. Cooper*, who died on or about the 23d *February*, 1809, without issue and intestate, and was at the time of his death in the possession and actual occupation of the premises in question. The said *T. Cooper* was possessed of the whole of the premises for the remainder of long terms of years, created by leases granted by the Honourable *John Grey*, lord of the manor of *Barwell*, in the time of Queen *Elizabeth*. By indenture of assignment duly executed by the parties thereto, bearing date 1st *November*, 1771, and made between the said *T. Cooper* of the first part, *J. Wileman* and *J. Lynes* of the second part, and *E. Kiss* of the third part, reciting *T. Cooper's* title to the lands therein mentioned, for the remainder of three several terms, namely, two of 10,000 years, and the other of 1,000 years; it was witnessed, that in consideration of a marriage intended to be had between *T. Cooper* and *E. Kiss*, and for the considerations mentioned in a certain indenture of three parts, intended to bear date after the day of the date thereof, (meaning a certain indenture of feoffment hereinafter set forth,) and made be-

tween *T. Cooper, S. Heyrick,* and *J. Heyrick,* of the first part; *W. Cooper* and *J. Kiss,* of the second part; and *E. Kiss,* of the third part; and in consideration of 5*s.* to the said *T. Cooper,* paid by the said *J. Wileman* and *T. Lynes,* and for divers other good causes and considerations, *T. Cooper* did bargain, sell, assign, transfer, and set over unto *J. Wileman* and *T. Lynes,* their executors, administrators, and assigns, all the said recited messuages, closes, hereditaments and premises, with their appurtenances, and all other leasehold closes, lands and hereditaments whatsoever, of the said *T. Cooper,* lying and being in the lordship of *Barwell* aforesaid; and all the estate, &c. to hold unto *J. Wileman* and *T. Lynes,* their executors, administrators and assigns, for the residue of the said terms of 10,000 years, 10,000 years, and 1,000 years; subject, nevertheless, to the trusts and proviso thereinafter declared, namely, upon trust to permit and suffer *T. Cooper,* his executors, administrators and assigns, to receive the rents for his and their own use; and that the said terms might be disposed of as he, *T. Cooper,* should direct, until the said intended marriage should be solemnized; and after the solemnization thereof, in trust to permit and suffer *T. Cooper* and his assigns to enjoy, receive and take the rents and profits of the premises for so long time of the said term and terms as should occur during the life of *T. Cooper;* and after his decease, upon trust, to permit and suffer the wife to receive the rents during her life; and after her death to permit the first son of the marriage to receive the rents during such time of the term as he should happen to live; and in case he should die before twenty-one, then the second and other sons successively; and in case there should be no issue male of the marriage, then to permit all and every the daughters to receive the rents so long as they should live; and if any such daughter or daughters should attain the age of twenty-one, in trust for such daughter or daughters, and her executors, administrators and assigns; and in case there should be no issue of the marriage, or in case all such issue should die before the age of twenty-

1824.
Doe v. Lynes.

one, in trust for the executors and administrators of *T. Cooper*. There was a proviso enabling the husband and wife, with the consent of the trustees, to revoke these uses or trusts, and to appoint fresh ones; and a covenant by *T. Cooper*, that the premises should remain, during the remainder of the term, in the trustees, without any disturbance by him or any person claiming under him, and also a covenant for further assurance. By indenture of feoffment, duly executed by the parties thereto, bearing date 2d *November*, 1771, and made between the said *T. Cooper*, *S. Heyrick*, and *J. Heyrick*, therein described, of the first part; *W. Cooper* and *J. Kiss*, therein described, of the second part; and *E. Kiss*, of the third part; it was witnessed, that in consideration of a marriage then intended to be solemnized between *T. Cooper* and *E. Kiss*, and of a considerable marriage portion which *T. Cooper* would receive with *E. Kiss* on the solemnization of the marriage, and for the making a jointure and provision of maintenance for *E. Kiss* in lieu of dower in case the marriage should take effect, and she should happen to survive *T. Cooper*, and for the settling and assuring the messuage, closes, lands and hereditaments, therein described, to the several uses, and under and subject to the proviso, condition, or agreement therein expressed; and also in consideration of 10*s*. each to *T. Cooper*, *S. Heyrick*, and *J. Heyrick*, paid by *W. Cooper* and *J. Kiss*, and for divers other good and valuable causes, *T. Cooper* did grant, bargain, sell, alien, enfeoff and confirm, and *S. Heyrick* and *J. Heyrick*, by the direction and appointment of *T. Cooper*, did, according to their several respective estates therein, bargain, sell, alien, enfeoff, and confirm unto *W. Cooper* and *J. Kiss*, their heirs and assigns, the said messuage and closes called the *Brockeys*, and their appurtenances, to hold to *W. Cooper* and *J. Kiss*, their heirs and assigns, to such uses as the same premises respectively stood limited to before the execution of the said indenture, until the solemnization of the said marriage; and after the solemnization thereof, to the use of *T. Cooper* and his assigns, for the term of his

natural life, without impeachment of waste; and after his decease, to the use of *E. Kiss*, and of her assigns, for her natural life, for her jointure, and in lieu of all dower and thirds; and after the decease of the survivor of them, *T. Cooper* and *E. Kiss*, to the use of the heirs of the body of *T. Cooper* on the body of *E. Kiss*, lawfully to be begotten; and in default of such issue, to the use of the heirs and assigns of *T. Cooper*, for ever. Then followed a proviso enabling *T. Cooper* and *E. Kiss*, during their joint lives, by deed, with the consent of *W. Cooper* and *J. Kiss*, or the survivor, or his executors, or administrators, to revoke the aforesaid uses or trusts, and limit fresh uses or trusts. *T. Cooper* by that deed covenanted, granted and agreed, for himself, his heirs, executors and administrators, to and with *W. Cooper* and *J. Kiss*, and their heirs, that the premises should remain to the uses and subject to the proviso aforesaid, and be quietly enjoyed accordingly, without any interruption by *T. Cooper*, his heirs or assigns, or *S. Heyrick*, and *J. Heyrick*, or either of them, their, or either of their heirs or assigns, or any persons whomsoever, claiming, or to claim, under them, or any of them. The indenture also contained a power of attorney from *T. Cooper*, *S. Heyrick*, and *J. Heyrick*, to *William Ward*, to deliver seisin of the messuage and premises, by the said deed granted and enfeoffed, to *W. Cooper* and *J. Kiss*, to hold to them, their heirs and assigns, according to the purport, true intent and meaning of the said indenture. The following memorandum of livery of seisin was indorsed on the deed: "Be it remembered, that on the 5th day of *November*, in the year of our Lord 1771, the within named *William Ward*, by virtue and in execution of the power and authority to him given and granted by the within written indenture, did enter into and upon the messuage or tenement and one of the closes within granted, in the name of the whole of the within granted hereditaments and premises, and take full and peaceable possession and seisin thereof, in the name of the whole of the within granted hereditaments and premises; and immediately after deliver

1824.

Doe v. Lynes.

over the same unto the within named *William Cooper* and *Joshua Kiss*, to hold to them, their heirs and assigns, according to the tenor, purport, true intent and meaning, of the within written indenture." *T. Cooper* continued in the possession and actual occupation of the premises, in the indentures of the 1st and 2d of *November*, 1771, mentioned, from the time of executing the indentures until his death in 1809, and paid an annual chief rent of sixpence, for part of the premises, to the lord of the manor of *Barwell*. *Wileman*, one of the trustees under the indenture of the 1st of *November*, 1771, died in *June*, 1785, and *T. Lynes*, the other trustee under the said indenture, died in *April*, 1787, and made, by his will, the defendant, *J. Lynes*, his executor. Upon the death of *T. Cooper*, *J. Lynes*, the defendant, as agent for the widow, *E. Cooper*, who was entitled to a life interest under the trusts or limitations of each of the said indentures of the 1st and 2d of *November*, 1771, let the premises to the defendant, *T. Walker*, and received the rent of the same for her life. The chief rent above mentioned was paid to the lord of the manor during the lifetime of Mrs. *Cooper*, and since her decease by the said *J. Lynes*, down to the year 1816. The premises sought to be recovered by the action are the whole of the premises granted by the indenture of feoffment of the 2d of *November*, 1771, and are the same as are comprised in the terms of 10,000 years, 10,000 years, and 1,000 years, in the deed of assignment of the 1st of *November*, 1771, mentioned. The marriage of *E. Kiss* and *T. Cooper* was solemnized. They had no issue of the marriage, and *T. Cooper* died in possession of the premises. His wife survived him, and died on or about the 9th of *April*, 1810. The question for the opinion of the Court is whether the plaintiff is entitled to recover.

Preston, for the plaintiff. To support this action two propositions must be established; first, that *T. Cooper* by the feoffment gained the fee absolutely, and acquired an estate in fee rightful against all persons but the reversioner;

and second, that by the feoffment the term was forfeited and destroyed, and the right under it barred. In favour of the first proposition, there is an uniform current of authorities from the period when *Bracton* wrote, down to the period when *Taylor* v. *Horde* (a) was determined. *Littleton* says (b), "when tenant for life maketh a feoffment in fee, by such a feoffment the fee simple passeth. For tenant for years may make a feoffment in fee, and by his feoffment the fee simple shall pass, and yet he had at the time of the feoffment made but an estate for term of years." Lord *Coke*, in his comment upon that section, says, "here it is implied, that albeit the feoffment made by lessee for years, be a feoffment between the feoffor and the feoffee, and that by this feoffment the fee simple passeth by force of the livery, yet is it a disseisin to the lessor (c). [*Holroyd*, J. It would be a disseisin only at the election of the lessor. That appears in the course of the judgment of Lord *Mansfield* in *Taylor* v. *Horde*, for he there says, "if the lessee for life, or years, makes a feoffment, the lessor may still distrain for the rent, or charge the person to whom it is paid, as a receiver; or bring an ejectment, and *chuse* whether he will be considered *as disseised*. In *Metcalf, d. Kynaston*, v. *Parry and others*, which was a case reserved at *Salop* Assizes, 25th *March*, 1742, for the opinion of the Court of Exchequer, (who gave judgment on 24th *November*, 1743,) the case was this. Tenant in tail, of lands leased by his father, to a second son, for lives, (under a power,) upon his father's death received the rent from an occupier, as owner, and as if no such lease had been made, during his whole life. He suffered a common recovery. It was holden 'that this was only a disseisin of the freehold *at election*, and that therefore he could *not* make a good tenant to the præcipe:' and the recovery was adjudged *bad*."] That certainly is an authority against the present argument, but it is the only one to be found. It stands alone, and is opposed to a host of contrary decisions. Besides, in that case there was merely

(a) 1 Burr. 60. (b) Sect. 611. (c) Co. Litt. 330. b.

1824. DOE v. LYNES.

a receipt of rent; there was no disseisin in fact by the elder son; the freehold was in the younger son by virtue of the lease. The feoffee does not become the tenant of the lessor. A feoffment is necessarily a disseisin in fact, except only as between the lord of the seignory and his tenant. *Bracton* cites the case of a stranger entering upon a vacant possession, and making a feoffment, and lays it down as clear law that such a feoffment creates a fee as between the feoffor, the feoffee, and all others who have not the right in them; nay, he even goes the length of saying, that by lapse of time the fee will pass, even against the person who has the right in him. Against some parties the feoffment perhaps may be void for fraud, or for usury; against the reversioner for instance, when the tenant remains in possession, and continues to pay rent. Lord *Coke* says, "our author saith, that tenant for term of years may make a feoffment; whereupon it followeth, that the feoffor may thereunto annex a warranty, whereupon the feoffee may vouch him." (*b*) In a subsequent passage he adds, "if a lessee for years, or tenant by elegit, &c. or a disseisor incontinent make a feoffment in fee with warranty, if the feoffee be impleaded, he shall vouch the feoffor, and after him his heir also; because this is a covenant real, which binds him and his heirs to recompence in value, if they have assets by descent to recompence; for there is a feoffment *de facto*, and a feoffment de jure: and a feoffment *de facto* made by them that have such interest or possession as is aforesaid, is good between the parties, and against all men, but only against him that hath right" (*c*). Then if the feoffment is good to pass the fee, the distinction taken by Lord *Hale* in *Focus* v. *Salisbury* (*d*), between tenant for life and tenant for years, is applicable. He says, "if lessee for years be, the remainder over for life, and the lessee for years levy a fine, and five years pass; the lessor is not barred by any non-claim, because the fine operates no-

(*a*) Bract. lib. 2. c. 14. See Co. Litt. 330. b. and *Butler's* note thereon.

(*b*) Co. Litt. 330. b. (*c*) Id. 367. a. (*d*) Hardr. 400.

thing, and *partes ad finem nihil habuerunt* may be pleaded to it: otherwise it is where a tenant for life levies a fine; for he has a freehold, and his fine displaces the remainders, and therefore an entry is requisite within five years after the death of the tenant for life. And therefore, when a lessee for years, or at will, is to levy a fine, it is usual for the lessee to make a feoffment first, to displace the other estates." *Whaley* v. *Tankred* (*a*) seems also to be an authority for the plaintiff on this point. The case was this, "*Charles Meynel*, tenant for ninety-nine years, if he live so long, the remainder to *Edmund Meynel* in tail, 14th *October*, 1656, enfeoffs the defendant and his heirs; and *Hilary*, 1656, levies a fine, *sur conusans de droit come ceo*, &c. with proclamations, to the same *Charles Tankred*, to the use of him and his heirs, who entered accordingly. 28th *August*, 1661, *Edmund Meynel* died. *Charles Meynel*, 18th *March*, 1664, died. 10th *April*, 23 *Car*. 2. the lessor of the plaintiff, being eldest son and heir of the said *Edmund Meynel*, entered, and whether his entry was lawful was the question, wherein the single point was, whether *Edmund Meynel* ought to have entered within five years after the fine levied, or shall have other five years after the death of *Charles Meynel*. And resolved *per tot. cur.* he shall have five years after the expiration of *Charles's* estate by his death; and that there is no difference between the lessee for life and lessee for years as to this point." [*Bayley*, J. Does a feoffment destroy a term created to attend the inheritance?] If the trustee of the term is privy to the feoffment it clearly does. All these authorities concur in shewing that by a feoffment, by a tenant for years, the fee passes against all persons, except him who is the rightful owner. *Taylor* v. *Horde* is the only case to the contrary, and that may have been rightly decided, either upon the ground of fraud, or according to its own peculiar circumstances, without impugning the present argument. *Fermor's* case (*b*) may be quoted on the other side, but that is very distinguishable

(*a*) Sir T. Raym. 219. See S. C. 2 Lev. 51.

(*b*) 3 Rep. 77.

1824.
Doe v. Lynes.

from the present. There the feoffor remained in possession and continued to pay the rent, and although it was held that the fine was void, as between the reversioner and his tenant, it was not held that the feoffment was void: and in that case partes ad finem nihil habuerunt could not have been pleaded in answer to the fine. Then second, although the feoffment did not pass the fee, as against the reversioner, still it destroyed the term and barred the right of the termor. The intention of the parties to the feoffment and the assignment, which were parts of one and the same transaction, plainly was, that the right of possession and the order of succession should from thenceforward be regulated, not by the term, but by the feoffment; and unless that intention is carried into effect, great confusion of rights must occur between real and personal representatives. Suppose the owner had died leaving issue; if the term were held to continue, the beneficial estate would go to the personal representatives; but if the feoffment were allowed to prevail, it would go to the heir. The object of the parties was to acquire the fee, and therefore they intended to commit an act amounting to a forfeiture, but at the same time to protect themselves from the consequences of a forfeiture, by the assignment of the term as it stood, untouched by the feoffment. [*Bayley*, J. They could not protect themselves from a forfeiture, unless the term had continuance.] Then, assuming the term to have continuance, the possession of the termor was the seisin of the reversioner, and thus there was no disturbance of the reversioner. The trustee has in substance attorned to the feoffee, and acknowledged a new reversioner, and that acknowledgment operated as a disclaimer of tenancy and as a forfeiture of the term: as was held in *Doe* v. *Williams* (*a*), and Lord *Dormer's* case, *Hil.* 1817. The latter has not yet been reported, but a short notice of it is to be found in a late edition of a treatise on Conveyancing (*b*). If one, under a claim of the inheritance, wrongfully enters upon land, and ousts the termor, his entry

(*a*) Cowp. 621. (*b*) Preston's Conveyancing, 2nd Edit. 32.

1824.

DOE v. LYNES.

operates as a disseisin of the reversioner. If the termor, in order to protect the term, afterwards re-enters, the reversion is restored; unless by a descent cast, worked in the interval, the right of the reversioner is converted into a right of action. Here, the termor has made a feoffment, and although he has subsequently paid rent, still he has destroyed the term, and determined the tenancy as between himself and the reversioner; if the reversioner elects so to construe the wrongful act of the termor. It is for the benefit of the reversioner, to argue that there is a forfeiture of the term. Disseisin, in fact, is no more than the conversion of a rightful into a wrongful seisin; and such disseisin may be effected either by a tenant for life or for years, by the act of making a feoffment: but a tenant in tail by making a feoffment works a discontinuance. The old remedy for disseisin, which was given by the statute of *Westminster*, but has been superseded by the modern action of ejectment, was the assize of novel disseisin. The proceedings under that writ were frequently merely fictitious, the parties being suffered to consider themselves as disseised, for the purpose of trying their right, by that short and summary remedy; and the disseisins in the majority of those cases were disseisins by election only. But originally, there were only two kinds of disseisin in fact; namely, a forcible entry upon the possession, or an entry upon a vacant possession; and a feudal act by a person who had obtained possession rightfully, as a lessee for life or for years, or by a person who had a mere naked possession. If a tenant for life or for years makes a feoffment, his wife becomes entitled to dower, because by making the feoffment, he has acquired the fee; and the feoffee, deriving title from the feoffor, is estopped from disputing the feoffor's title to the fee: but if a tenant for life grants a lease to a third person, for the life of such third person, his wife is not entitled to dower (*a*). Here the disseisee cannot contend that his is a disseisin by election. Where a tenant for years is in possession, a stranger cannot

(*a*) *Preston* on Estates, *Dower*, 1st Edit. 555.

1824. Doe v. Lynes.

make a feoffment, unless he actually oust the tenant for years, or obtain his consent to the livery. Possession alone is necessary to constitute a good and valid feoffment; but where the tenant for years consents to the feoffment, which is a wrongful act against the reversioner, his consent to livery made by a stranger is a forfeiture, for he thereby attorns to a stranger, and recognises a title in him as against the rightful owner. Here, if the assignee of the term had entered, under a claim of the term, immediately after the feoffment, he would have restored the seisin to the reversioner. *Littleton*, treating of this subject, writes thus (*a*); "if a man be disseised by two, if he release to one of them, he shall hold his companion out of the land, and by such release, he shall have the sole possession and estate in the land. But if a disseisor enfeoff two in fee, and the disseisee release to one of the feoffees, this shall enure to both the feoffees, and the cause of the diversity between these two cases is pregnant enough, for that they come in by feoffment, and the others by wrong." And Lord *Coke*, observing upon this passage, says (*b*), "this is to be understood where tenant in fee simple is disseised, and release; for if tenant for life be disseised by two, and he releaseth to one of them, this shall enure to them both; for he to whom the release is made hath a longer estate than he that releaseth, and therefore cannot enure to him alone, to hold out his companion, for then should the release enure by way of entry and grant of his estate, and consequently the disseisin to whom the release is made should become tenant for life, and the reversion revested in the lessor; which strange transmutation and change of estates in this case, the law will not suffer. But if lessee for years be ousted, and he in the reversion disseised, and the lessee release to the disseisor, the disseisee may enter, *for the term for years is extinct and determined.* But otherwise it is in case of a lessee for life; for the disseisor hath a freehold, whereupon the release of tenant for life may enure, but the disseisor hath no term for years, where-

(*a*) Sect. 472.

(*b*) Co. Litt. 275. b.

upon the release of the lessee for years may enure." That authority decides this case, because it shews that the term was destroyed by the feoffment, and that immediately upon the feoffment being made, the lord had a right to enter. [*Littledale*, J. How does it shew that? It is admitted that the feoffment is ineffectual; unless the termor was privy and consenting to it, of which there is no evidence at all. The term had been assigned before the feoffment was made, and there is nothing to connect the assignees with the feoffment, or to indicate their consent to it.] The language of the assignment clearly implies, that the trustees assented to the feoffment, for it refers to a certain indenture of three parts, intended to bear date on the day following, which indenture was in fact the feoffment. Besides *Cooper*, by the very act of making the feoffment, claimed a title adverse to the trustees.

Tindal, contrà, was stopt by the Court.

Abbott, C. J. I am of opinion that the plaintiff cannot maintain the present action. My judgment proceeds upon the second point in the case, and is founded upon the ground that the feoffment did not destroy the term of years, inasmuch as it is not shewn to have been made with the privity or consent of the persons entitled to the term. But, though this is the ground of my present judgment, I must nevertheless beg to be understood as by no means assenting to the doctrines which have been advanced upon the first point in the case. There is much good sense in the principles laid down by Lord *Mansfield* in his judgment in *Taylor* v. *Horde*, and I for one should be exceedingly sorry to find any reason for thinking that they cannot be supported in point of law. It has been admitted in argument in this case, that if there is a lessee for a term of years in possession, and a feoffment is made by a stranger, that feoffment will not destroy the term, unless the lessee assented to it. Then how does that admission bear upon the facts of this case? When the

1824.

DOE
v.
LYNES.

feoffment was made, *Cooper* had ceased to be the lessee for the term of years, because on the very day preceding the execution of the feoffment, he had assigned over all his interest in the term to trustees. Therefore, on the 2nd *November*, when the feoffment was made, the term of years was vested in the trustees and not in *Cooper;* and what is there to shew that the trustees were either privy or consenting to the feoffment? Nothing. If in point of fact they did assent to the feoffment, that assent should either have been expressly found, or such facts should have been stated in the case as would necessarily raise the inference that the assent was given: but neither appears upon the face of this case. It is said that the language of the recital of the indenture of assignment is such as necessarily raises the inference. It does indeed recite that it is made in consideration of an intended marriage between *T. Cooper*, the assignor, and *E. Kiss*, and for the considerations mentioned in a certain indenture of three parts, intended to bear date the day after the date of the assignment, and made between *T. Cooper*, *S. Heyrick* and *J. Heyrick*, *W. Cooper* and *J. Kiss*, and *E. Kiss;* but I cannot discover from that recital any indication, that the assignees accepted the term upon trusts, among other things, to enable *Cooper* to make a feoffment, whereby he must destroy the term, and defeat the trusts. The deed of assignment does not describe the intended deed as an indenture of feoffment, and therefore it is impossible to infer that the trustees knew it was intended to be an indenture of feoffment; while on the other hand, there is strong ground for presuming that they neither knew of or assented to any such deed, because its necessary operation would have been to defeat the objects of the trust and the assignment. But then it is said that the possession of *Cooper* was adverse to the trustees; to that I cannot accede: because as he had the beneficial enjoyment by virtue of the assignment, his possession was consistent with the trust, and could not be adverse to the trustees. In this view of the case, the whole foundation of the argument adduced has

failed, as there is no evidence of the trustees having assented to the destruction of the term, or to the subsequent execution of the feoffment. It may still remain a question between the reversioner and the lessee, whether the feoffment did, or did not work a forfeiture; but that question it is not necessary now to decide. Upon the grounds that I have stated, I am clearly of opinion that the judgment of the Court must be for the defendants.

BAYLEY, J.—It is not denied in this case, that the rightful fee is, or at least ought to be, in the original lessor, or his representatives; but the struggle has been to support an attempt to extinguish the term, and turn it into a wrongful fee, and to vary the relative rights and conditions of the lord and third persons. One consequence necessarily resulting from the doctrine thus contended for would be, that property which would otherwise have been liable as a chattel interest to the payment of debts, would pass to the heir at law free from those liabilities, which would have attached upon it in the hands of a personal representative. We have been told that since common recoveries have been in use, the usual practice among conveyancers has been, to make a feoffment, and give livery of seisin of the land to that person against whom it was intended to bring the writ of entry; it being thought that the safest conveyance by which a tenant to the præcipe could be made, was the feoffment, and that the feoffment will pass a good estate of freehold, either by right or by wrong, if the feoffor is in possession when the livery of seisin is made. But, sitting in a court of law, we are bound to set our faces against every deed which is intended to work a fraud or a wrong, and I, therefore, am pleased to find myself justified in holding, that the feoffment in this case cannot prevail. The general rule of law is, that unless the feoffment is made with the privity and consent of the parties entitled to the actual possession, it cannot operate so as to defeat their interest. In this case, therefore, the term continued against all parties except the lord only; and

1824.
DOE
v.
LYNES.

whether it continued against him it has become unnecessary to say, because on the very day before the feoffment was made, *Cooper* assigned his interest in the term to trustees. Those trustees accepted his interest in the term upon trusts which were likely to be of long duration, and it was their duty to protect the term, and not to lend themselves to any act tending to destroy it. We must presume that they performed that duty until the contrary is shewn, and as it is not found as a fact in the case that they consented to the feoffment, we must presume that they did not; and then it is admitted that the term continued, because as the trustees were the parties entitled to the actual possession, they must be supposed to have had it. Should the lord, as he may, insist upon the forfeiture, a different question will arise, but that it is no part of our duty to decide to-day. As between the present parties, it is enough to say that this action cannot be maintained.

HOLROYD, J.—Even if it had appeared upon the facts of this case that the feoffment had been made with the consent of the trustees of the term, I should still have been of opinion that the term was not destroyed, except at the election of the lord, who alone could have taken advantage of it. But the consent of the trustees is not found as a fact, and cannot be presumed, for there are no facts in this case upon which to build such a presumption. It is conceded that a feoffment made by a stranger will not operate as an extinguishment of the term. It is plain that Lord *Mansfield* considered all the passages cited to-day from *Littleton* and from Lord *Coke*, upon the subject of disseisin generally, as applying to a disseisin by election only. In this case the actual possession was never altered; it continued the same as if the term had continued, and as if the possession had been still enjoyed under the term; therefore the possession must be considered as grounded upon right, and not upon wrong. Serious injustice would result in cases of this nature if the law would assist secret conveyances such as these,

1824.
Do
v.
Lynes.

and make them valid against the persons really interested in the property. Feoffments and disseisins have undergone a material and vital change in their nature since the period when *Littleton* wrote; and the present case is essentially different from the old cases, where an actual ouster of the freeholder, and an actual change of possession took place. In those cases the freeholder ceased to perform suits and services, and not only was the possession changed, but the lord adopted the party coming into the possession, and suffered him to act in all respects in the character of his tenant. For these reasons I am of opinion that the term in this case has not been destroyed, and therefore that the lessor of the plaintiff is not entitled to recover.

Littledale, J. was of the same opinion.

Judgment for the defendant.

Lyttleton and another *v.* Cross and Moody, Executors of Hugh Lush.

In covenant against executors the defendants pleaded at nisi prius as a plea puis darrein continuance, a judgment recovered upon a bond of the testator after the last continuance, to wit, on the 2d day of *August* as of the preceding *Trinity* Term, and the plaintiff having pleaded over:—Held, that the plea was an answer to the action, although by fiction of law the judgment was obtained before the last continuance.

Where the purposes of justice require that the true time when a judgment is recovered or a writ is tested shall be shewn, it is competent to a party to avail himself of the fact by averment in pleading.

COVENANT upon an indenture executed by the defendants' testator, for good title and for quiet enjoyment of certain premises mentioned in the pleadings. The declaration, which was of *Hilary* Term, 3 *Geo.* 4, set out an indenture made between Sir *Richard Colt Hoare*, Bart. and the plaintiffs, of the one part, and *Hugh Lush*, deceased, of the other part, by which, in pursuance of an agreement for an exchange of lands, *H. Lush*, the deceased, granted, bargained, sold, and exchanged to the plaintiffs, their heirs and assigns, a cottage or dwelling-house, lands, hereditaments, and premises, to hold to the plaintiffs, their heirs and assigns for ever, with covenant, by *Lush*, for a good title and for quiet enjoyment. The declaration then averred, as breach of the cove-

nant, that *Lush* had not a good title to the premises, and that the plaintiffs were ejected by persons having lawful title. Pleas, first, plene administravit, and, second, a retainer by *Cross*, one of the executors, with the assent of *Moody*, the other executor, on account of a promissory note, made by the testator to *Cross*, for 100*l.*, and that at the time of testator's death the same was due, and that defendants had fully administered all and singular the goods and chattels of the testator, except goods and chattels to the value of 56*l.*, which were not sufficient to satisfy *Cross's* debt. The plaintiffs by a replication of *Trinity* Term of the same year replied, that the defendants had assets in their hands of the testator, sufficient to satisfy the damages sustained by the plaintiffs by reason of the breaches of covenant averred. By a rejoinder, of *Hilary* Term, 4 *Geo.* 4., the defendants took issue upon the replication, and the record was taken down to the *Somersetshire* Assizes, 1823, and on the 2d of *August*, at those Assizes, the defendants pleaded as a plea puis darrein continuance that one *Thomas Cross*, after the death of the testator *Lush*, to wit, in *Trinity* Term, 4 *Geo.* 4., by bill, without the King's writ, had impleaded the defendants as executors in a certain plea of debt, for the sum of 800*l.* upon a writing obligatory, entered into by *Lush* in his lifetime, to *Thomas Cross*, and such proceedings were thereupon had in the said plea of debt, that the said *Thomas Cross* afterwards, and after the last continuance of this said cause, that is to say, after the 18th day of *June*, in the year last aforesaid, from which day until the 6th day of *November*, in *Michaelmas* Term next, unless the Justices assigned to hold the Assizes for the county of *Somerset* should first come on the 2d day of *August*, in the year last aforesaid, this said cause continued, to wit, on the said 2d day of *August* as of last *Trinity* Term, in the 4th year of the reign of *Geo.* 4. as aforesaid, recovered a certain judgment of the Court of King's Bench against the said defendants as executors as aforesaid, whereby it was considered that the said *Thomas Cross* should recover against the said defendants

1824.

LYTTLETON v. CROSS.

the sum of 800*l.* and 84*s.* for his damages and costs. The plea then averred that the said judgment was still in force, and that defendants had fully administered all and singular the goods and chattels of the testator, except goods and chattels of the value of 56*l.*, which were insufficient to satisfy the debt and damages recovered by the said judgment. The plaintiffs replied to this plea, that defendants, before the exhibiting of their bill in this behalf, to wit, on the 1st of *January*, 1823, at, &c., had notice of the said writing obligatory and debt in the same plea mentioned. Demurrer to the replication and joinder in demurrer.

Campbell, in support of the demurrer, contended that this case was not distinguishable from *Prince* v. *Nicholson* (*a*). That was an action against an executor for goods sold to the testator, and the defendant, at nisi prius, pleaded a plea puis darrein continuance of judgment recovered in a plea of debt on the simple contract of the testator, commenced since the present action, and the Court, on demurrer, held, first, that it was no answer to this plea, that the judgment pleaded was in a plea of debt on the testator's simple contract; and second, that the plea was not invalidated by the defendant having suffered judgment to pass against him voluntarily. From this case it was clear, that a plea of judgment recovered on the bond, puis darrein continuance, was a good answer to this action, and the circumstance of the defendants having had notice of the bond in question before action brought, was wholly immaterial. [*Bayley*, J. I am inclined to think so too. Though the defendant had notice of the bond, he could not plead it until judgment had been obtained. Here are claims in an equal degree.—*Abbott*, C. J. And assuming that the executors had notice of the bond, they were not bound to pay it until they were sued: besides, the action here is brought for unliquidated damages.—*Bayley*, J. If the plaintiff in this action could have got judgment before action brought on the bond, could he have kept

(*a*) 1 Marsh, 280. 5 Taunt. 333, S. C.

1824.

LYTTLETON v. CROSS.

it? Here the obligee of the bond remained quiet until the present action was brought, probably thinking that the executors would favour him, which they had a right to do.—*Abbott*, C. J. We will hear the other side.]

E. Lawes, contrà. *Prince* v. *Nicholson* is distinguishable from, and is no authority to govern the present case. The point there was, whether the judgment pleaded, since the last continuance, had been suffered by the defendants to pass against them *voluntarily*. Here the judgment, having been signed in vacation, must have been upon a warrant of attorney, given by the defendants, and, therefore, they were *active*, whereas in *Prince* v. *Nicholson* the executors were passive. That case is also distinguishable from this in another circumstance, because here the defendants have admitted, by their pleadings, that they had *notice* of the bond before this action was brought. Now the question is, whether the defendants, after endeavouring to defeat the plaintiff by pleading two delusive pleas and failing in them, are at liberty to set up nunc pro tunc, a judgment collusively given in the vacation to another specialty creditor? [*Bayley*, J. Assuming this to have been a judgment on a warrant of attorney, have not the executors a right to confess judgment on such an instrument? If the plaintiff does not chuse to reply that there was fraud in the transaction, what right have we to assume it?] It is admitted on the face of the pleadings, that the defendants, before the commencement of this action, had notice of the bond upon which the judgment was recovered, and if they had intended to prefer the bond creditor before the plaintiff, they ought to have done so in the first instance, instead of lying by until the eve of the present trial, and then pleading the judgment puis darrein continuance. This is a form of pleading which is perfectly new, as was said in *Waters* v. *Ogden* (*a*), although in that case the justice of the case rendered it necessary. If the executors had not known of the bond, and in the inter-

(*a*) 2 Doug. 452.

val before the trial of this action, the judgment had been obtained, then it might be fairly pleaded; but the question is, whether this is to be considered a fair and bonâ fide plea after prior notice of the existence of the debt. Independently, however, of this objection, it is clear that the plea is bad in point of law. It describes the judgment as having been recovered in vacation as of the preceding *Trinity* Term. Now, in construction of law, this must be considered as a judgment of *Trinity* Term, although it may, in point of fact, have been signed in the *Trinity* vacation. In legal effect it is a judgment of the term, and ought to have been so pleaded. [*Bayley*, J. If that be so, then it must have been a judgment before the last continuance, and could not have been pleaded at all.—*Holroyd*, J. In *Dodsworth* v. *Bowen* (*a*), where a bill was filed against an attorney in vacation, it was held that the day of filing might be inserted in the memorandum, and the form, which was drawn up by *Buller*, J., is "that on, &c. a day after the cause of action accrued, the plaintiff brought into the office of the clerk of the declarations, according to the course and practice of the Court, his certain bill, against the defendant, and filed the same as of *Michaelmas* Term."] If that form had been pursued here, possibly there would have been no objection, but it is alleged in the plea in terms that the judgment was recovered in *Trinity* vacation, which in point of law could not be. [*Bayley*, J. The practice of the Court is matter of law, and the Court, and not the jury, are to decide it. The Court will take judicial notice of the practice.] But the question here is, whether the signing of the judgment is well pleaded or not. The defendants ought to have pleaded that the judgment was signed in the vacation, according to the practice of the Court, whereby it became a judgment as of the preceding term. If that be so, then the judgment would relate back to the first day of that term, and would be no answer to the action, by way of plea puis darrein continuance, inasmuch as it would then be a judgment recovered

(*a*) 5 T. R. 325.

1824.

LYTTLETON v. CROSS.

before the last continuance. Mr. *Tidd* (*a*) lays it down that if any matters pleadable after the last continuance happen after plea, and before the return of the venire facias, they must be pleaded in banc. But the plea of puis darrein continuance is inconsistent with the other pleas pleaded. In *Vaughan* v. *Brown* (*b*) it was held that a matter which was in esse at the time of the first plea could not be taken advantage of by way of plea puis darrein continuance, and *Lee*, C. J. was of opinion that the same rule applied where the non existence thereof was owing to the laches of the party. Another stamp of unfairness in this case is, that the defendants do not state what the condition of the bond was, and non constat that it was fairly and honestly paid. It is laid down in *Parker* v. *Hatfield* (*c*) that executors in pleading judgment with penalties should shew how much is really due, but here there is nothing to shew that any thing was due. [*Holroyd*, J. It has been held that you may plead the bond without setting out the condition, the penalty being the debt in law, but in point of law you may do either.]

Campbell, in reply. In this case the plaintiffs might have applied to the Court to set aside the judgment if it had been obtained by any abuse of its process or if it had been obtained fraudulently, the fraud might have been replied. But there is no suggestion in the pleadings that the judgment was fraudulent, nor have the defendants replied nul tiel record, nor that the judgment was not recovered in the manner alleged in the plea. They have merely pleaded over, that the defendants had notice of the bond, and, therefore, the truth of the allegation in the plea being admitted by the replication, the simple question is, whether there is not enough set out to entitle the defendants to judgment. It is a general rule, that that may be pleaded puis darrein continuance, which would be a good

(*a*) Tidd, 8 ed. 901. (*b*) Andrews, 332. S. C. 2 Strange. 1106.
(*c*) 1 Salk. 312.

plea in chief to the action if the matter has arisen after the last continuance. Then the Court will have only to decide, first, whether this would not have been a good plea, had the judgment been recovered before the plea in chief; and, second, whether it does not appear on the face of the pleadings, that this matter has arisen in fact since the last continuance. There can be no doubt whatever that this would have been a good plea, had the judgment been recovered before the original plea in bar, and would have afforded a complete defence to the action, because it would have been a judgment upon a specialty debt of equal degree. If so, then if it has arisen since the last continuance, it may be pleaded puis darrein continuance. It is clear that the judgment was recovered since the last continuance. There is no suggestion that it comes too late, the only question being whether it can be pleaded at all. Now there is a positive allegation in the plea, that the judgment was recovered after the last continuance, to wit, on the second day of *August*, 1823. It is manifest that a judgment recovered at that time could not by possibility have been pleaded before the last continuance. The Court are to look to the precise time when the judgment is entered up, in order to determine whether the plea can be pleaded puis darrein continuance. If that be not done, the defendants will be absolutely deprived of the benefit of that plea, which would be a complete answer to the action, had it been originally pleaded. In practice, the Court may order a judgment signed in vacation to be entered up as of the preceding term, but in a case of this nature, the defendant is bound to shew when the judgment was signed, in order that he may have the advantage of the plea. From the form of the plea, it must be presumed that the judgment was recovered according to the course and practice of the Court, in the absence of a special demurrer. It is not necessary to aver that the judgment was obtained according to the course and practice of the Court, and *Prince* v. *Nicholson* is an express authority to shew, that

1824. LYTTLETON v. CROSS.

even an irregular judgment may be taken advantage of by executors until it is set aside. Justice requires that executors should be at liberty to avail themselves of any judgment obtained since the last continuance, and the Court will presume that the judgment in this case was given in the manner it is alleged to have been given, there being no issue upon its validity. Every intendment in such a case must be made in favor of executors.

ABBOTT, C. J.—I am of opinion, that the defendants in this case are entitled to the judgment of the Court. I think that the plea is properly pleaded, and that the replication averring notice of the bond is wholly immaterial. The situation of an executor is often one of great peril. The law casts upon him, on the one hand, the burthen of paying the debts of his testator in a particular order, and on the other he is allowed certain privileges, of which, certainly, I am not disposed to deprive him. One of his privileges is, that if there are creditors of equal degree, he may, without blame, pay which of the number he thinks fit. Another is, that if several suits be commenced against him at the same time, and he has not assets to pay all, he may confess a judgment in favor of any one he chuses; nay, if one creditor has first sued, and another sues before the former pleads, he is entitled to favor the creditor who commences the suit last by satisfying him first. This has been decided many years since. The first case that has arisen in modern times, as far as we know, of a plea puis darrein continuance of judgment recovered after the last continuance, is *Prince* v. *Nicholson*. That was an action for goods sold and delivered to the testator. The executor pleaded in the first instance non assumpsit, and at nisi prius pleaded puis darrein continuance a plea of three judgments recovered against him as executor in the same term, in actions of debt, which were commenced also in that term, for money borrowed by the testator, and plene administravit præter 300*l.*, the amount of those judgments.

One of the objections was, that the executor having pleaded in chief, could not plead another judgment recovered against him as executor, since the last continuance, because such judgment must have been suffered voluntarily. That case appears to have been argued with great learning and ability by the counsel on both sides. The Court took time to consider of it, and in the result a solemn judgment was given by Lord Chief Justice *Gibbs*, who was not only a lawyer of great eminence in every department of his profession, but peculiarly so in the science and practice of special pleading. The Court decided that the plea was not invalidated by the defendant having suffered judgment to pass against him voluntarily. Unless, therefore, this case can be distinguished from that, it is an authority, as it appears to me, to govern our judgment, and I am of opinion that in substance they are not distinguishable. It is contended by Mr. *Lawes* that in this case we must infer that the judgment pleaded puis darrein continuance was a judgment upon a warrant of attorney. If there is enough on the record to inform us of that fact, there was also enough on the record in *Prince* v. *Nicholson* to inform the Court of Common Pleas of the like fact; because it appears by the pleading in that case, that the party whose judgment was pleaded had impleaded the defendant for money borrowed by the testator in his life time, which is the usual form of a warrant of attorney, and that such proceedings were thereupon had that the party recovered his debt, and also 80 shillings for his costs; and further, it appears that the judgments were recovered in the very same term in which the actions were commenced. So that if we are bound to take notice that this was judgment upon a warrant of attorney, the Court of Common Pleas was equally bound to take notice of that fact. The case, therefore, of *Prince* v. *Nicholson* is an express authority for shewing that the defendants were authorized by law in confessing judgment in favor of another creditor, even after the commencement of the present action, and that the judgment so

1824.

LYTTLETON v. CROSS.

recovered is an answer to the action. The remaining consideration, and it is one of some difficulty, is, that the defendants have here pleaded that the judgment recovered against them was recovered on the 2d day of *August*, as of the *Trinity* Term preceding. The fact that it, was so recovered on that day is admitted by the plaintiffs having pleaded over. The question then is, whether we can give effect to a judgment recovered on that day, in a case like the present, or are bound to say, that although it is recovered on that day, yet as by fiction of law it is to be treated as a judgment of the preceding term, it is consequently not an answer to the action, because it would then be a judgment obtained before the last continuance. Now if we were so to decide, we must say that in a case like the present the defendants would be precluded from shewing the truth of the fact, and would be bound by the fiction of law, which refers the judgment to the preceding term. I take the rule with respect to the fiction by which all writs are supposed to issue during term, and all proceedings to take place in term, to be this, namely, that if it be necessary for the interests of a party to shew, contrary to the fiction, that the fact did not actually take place in the term, although for some purposes it must be so considered, yet it is competent for him so to do. One of the instances where that may be done is when a bill is filed against an attorney in vacation, which by fiction of law is treated as of the preceding term, yet the party filing it may shew the very day on which it was filed. Another instance is where a writ is issued in vacation upon a cause of action which does not accrue until after the term, it is competent to the party to shew the time when it actually issued, if it be for his interest that he should do so. Now these are familiar instances in which that principle is adopted. The cases establish it as a general rule, that where the interest of the party requires that he should shew that the matter took place in the vacation, although by the forms of law it must be entered on the record as of

1824.

LYTTLETON *v.* CROSS.

the preceding term, yet he may do so by averment. In this case the judgment was in point of fact not given until the 2d day of *August*, and although it must appear upon the record as a judgment of the preceding term, yet I think the defendant was entitled to treat it as a judgment against him in the vacation, and shew by averment that it was a judgment recovered after the last continuance. If he was bound by the fiction of law it would be a judgment recovered before the last continuance, and he would be deprived of the opportunity of shewing the fact as it really occurred, and be concluded against the justice of the case. For these reasons I am of opinion that this plea was well pleaded, and the defendants are entitled to judgment.

BAYLEY, J.—I am of the same opinion. Where several debts of equal degree are due from an executor, the law says, he is entitled to exercise his discretion which he will pay first, and if there are several suits brought against him, for debts of the same degree, he may confess judgment in any one, as he thinks fit, without any regard to priority. An executor may sometimes act capriciously in the election he makes, but there are many instances in which the exercise of a sound discretion will fully warrant him in giving a preference to one specialty creditor over another. I am therefore of opinion that in this case, unless the defendant is precluded by his form of pleading, the judgment recovered against him upon the bond is pleadable in bar. If instead of this being a plea puis darrein continuance, it had been a plea in chief, there is no doubt it would have been an answer to the action. The difficulty, however, which is pressed on the consideration of the Court is, that although this is described as a judgment recovered in vacation, yet, by fiction of law, it must by relation be considered as a judgment of the preceding term, and consequently as it would thereby be a judgment obtained before the last continuance, it is not pleadable puis darrein continuance. Now as it cannot be denied that this would have been a legal defence, if it

1824. LYTTLETON v. CROSS.

could have been pleaded in chief, I think the fiction, by which it is considered a judgment as of the preceding term, ought not to prevail against the fact, so as to work injustice. The maxim of the English Law is "in fictione juris subsistit æquitas." Therefore, wherever a fiction is calculated to do injustice, the Court are to look to the real facts of the case, in order that justice may be done. The Court is supposed to do all business in term time, but there is a great deal of business done out of term, with which the Judges do not personally interfere. In the vacation, judgments are signed and writs are issued, and these are supposed to have relation to the preceding term, and are entered or tested accordingly; but if it is necessary to shew that a judgment is signed, or a writ is issued on a particular day, it is competent to a party to shew the fact in opposition to the fiction. Where the validity of a defence to an action depends upon the precise time when a writ issues, or a judgment is signed, can there be any thing more unreasonable, than that the defendant should be tied up by a mere fiction, without regard to the reality? Here is a judgment signed in vacation, which by fiction of law is a judgment of the preceding term. The very gist of the defence is in shewing the precise time when the judgment was recovered, and I think it would be great injustice if the defendants were precluded from shewing the fact by averment, in order to relieve themselves from the operation of the fiction. I take the true effect of the plea in this particular case to be, that although in point of form it is a plea as of the preceding *Trinity* Term, yet it is a plea of a judgment given *in fact* on the 2d day of *August*. It is clear that if it was actually signed in the vacation, it could not have been pleaded before the last continuance. For instance, it could not have been pleaded before the 18th of *June*, which was the next preceding continuance, for the judgment had no existence until the 2d of *August*. There is therefore a fact alleged which would make the judgment a good defence, as a plea puis darrein continuance, but for the fiction of law, which I think ought not to prevail. If,

however, this were not a sufficient answer to the objection, I am not clear that the defendant might not be at liberty to resort to the statute 3 *Geo.* 4. c. 102, by which the Judges of this Court are authorized to sit in the vacation, and pronounce judgments as of the preceding term. There might possibly be this difficulty in bringing the case under the operation of that statute, namely, that the judgment is stated to have been recovered on the 2d of *August*, and we might be bound to take notice of the precise time at which it was recovered; but the day being laid under a videlicet, it might be rejected as being inconsistent with the other allegation, that it was a judgment signed as of *Trinity* Term, for if it was pronounced by the Court in the vacation, then it would be a recovery as of *Trinity* Term. But I think the plaintiff is concluded by his replication, for if a party against whom such a plea is pleaded thinks proper to plead over, and does not object to the manner in which the judgment was obtained, but relies upon something consistent with it, by merely replying that the defendants had previous notice of the bond, he is not at liberty afterwards to impeach the judgment. I therefore think that the Court is at liberty, and indeed bound to assume this to be a regular judgment upon the principle, omnia præsumantur ritè esse acta. For these reasons it appears to me that this plea is a good answer to the action and consequently the defendants are entitled to judgment.

HOLROYD, J.—I think the matter contained in the plea puis darrein continuance must be taken as arising since the last continuance, and therefore pleadable in an answer to this action. The notice alleged in the replication appears to me to make no difference whatever, and in no respect distinguishes this case from *Prince* v. *Nicholson*, because whether the executor knew of the bond or not, the knowledge of its existence would not deprive him of the benefit of the plea, in answer to an action upon a liability of equal degree. I think the case of *Prince* v. *Nicholson* is

1824.

LYTTLETON v. CROSS.

a decisive authority to shew, that the matter contained in this plea may be pleaded puis darrein continuance. The question in this case is, whether this plea is pleaded in due time, as a plea puis darrein continuance. That executors have power to prefer one creditor before another of the same degree is a point upon which I shall say nothing, because it is too clear for argument. Whether this plea is pleaded in due time or not depends upon whether a party by his plea may shew the true time and circumstances of the payment, or whether by fiction of law he is estopped from so doing. It is true that in point of law, independently of the late act of parliament, a judgment is considered as given in term time, when the Court sits in banc, and cannot be deemed as given at any other time. The Court, however, is not estopped from taking cognizance of the practice which is known to prevail of signing judgments in vacation, or bringing in aid, for the purposes of justice, the time when the judgment was really signed, although by fiction of law it is made to relate to a prior time. The question has arisen heretofore with respect to the issuing of writs, whether, though issued in vacation, they must not be tested as of the preceding term, and it has been held that though by fiction of law they must be tested of the term, and the party is estopped by the teste of the writ from disputing the time when it issued, yet for the purposes of justice, the Court may take cognizance of the time when it actually issued. There are some cases, particularly where the statute of limitations is pleaded, in which it is necessary for the purposes of justice, either that the true time of the commencement of the action, or the filing of the plea, should be taken into consideration. That principle was decided in *Johnson* v. *Smith* (*a*), which was argued seven or eight times, and the Court came to the conclusion, after considering all the authorities upon the point, and every principle of law applicable to it, that for the purposes of justice the true time when the writ issued may be ascertained. Lord *Mansfield*

(*a*) 2 Burr. 950.

there makes an observation which is strictly applicable to this case. He said "the Court would not endure that a mere form or fiction of law, introduced for the sake of justice, should work a wrong, contrary to the real truth and substance of the thing." That is an express authority to shew, that a party is not estopped by a mere fiction of law. It is true that in the latter part of the case Lord *Mansfield* draws a distinction between the case of a teste and a judgment, for he says "the reason why nobody shall be permitted to aver that a judgment was signed after the first day of the term, is because the fact is not relevant. The legal consequences do not depend upon the truth of the fact, on what day the judgment was complete, but upon the rule of law, that it shall be deemed complete, and bind to all intents and purposes by relation." Now the very ground of the distinction there drawn shews that it is inapplicable to the circumstances of the present case, because here the judgment was signed during the vacation, and the time of its being signed is essentially relevant, with a view to determine the legal operation of the judgment. The last continuance here would be the last day of the term, and therefore every thing depends upon the fact of the judgment having been given subsequent to the term. The day on which it was actually signed is strictly relevant, because the validity of the plea depends upon the truth of the fact on what day the judgment was completed. Lord *Mansfield* again says "the moment the law said, that judgments should bind purchasers *only from the signing*, it followed that in the case of purchasers the time of signing might be shewn." So I say here. The plea in this instance is a good defence to the action, provided it be pleaded since the last continuance; and in order to avail himself of it, the defendant is at liberty to shew the time when the judgment was actually signed. If that were not the case, the consequence would be, that although the law says this would be good matter to be pleaded in bar, yet the defendant would be altogether precluded from the benefit of it, because by the fiction of

1824.

LYTTLETON v. CROSS.

law it would not be a judgment recovered since the last continuance. But the true principle is, that a mere fiction of law cannot be set up in answer to a fact, which is a good matter of defence, if it is pleaded since the last continuance. Now here in fact the judgment upon the bond is obtained since the last continuance, and it is so pleaded. The fiction of law is inconsistent with the fact, and cannot be suffered to prevail in order to work injustice. Upon the principle laid down by Lord *Mansfield*, the time when the judgment was signed is perfectly relevant, and therefore it is competent to the defendant to shew the actual time when the judgment was signed, in order to avail himself of the plea, and as the judgment here was in fact signed after the last continuance, the plea is well pleaded.

LITTLEDALE, J.—I am of the same opinion. The action in this case being brought on a specialty, and the action which is the subject of the plea being also upon a specialty, the rule is, that where debts are of an equal degree, the executor may pay which he pleases. So if two actions be brought for debts of one and the same degree, the executor may confess the second and plead it in bar of the first. There is no doubt therefore that if an action had been brought upon the bond, and judgment had been obtained, it might be pleaded to this action. I am also of opinion not only that it might have been originally pleaded, but that if the judgment had been obtained before the trial of this action, and after issue joined, it might be pleaded as a plea puis darrein continuance. That point was settled in *Prince* v. *Nicholson*. To the doctrine of that case, I entirely accede, and I think the reasons there given by *Gibbs*, C. J. are quite conclusive. In that case, however, the plea was pleaded in term, but the judgment was entered with a special memorandum, by which it was clearly shewn that the matter pleaded arose since the last continuance. The judgment pleaded appeared on the face of the record to have been obtained before the trial, and therefore the general question,

whether a plea of this kind could be pleaded puis darrein continuance was satisfactorily decided in the affirmative. But the difficulty I have had in the course of the argument of this case is, that the matter pleaded here does not appear upon the face of the record to have arisen since the last continuance. The judgment is stated to have been signed on the 2d *August*, as of the preceding term, therefore the judgment of the preceding term does not appear *in omnibus* to be matter pleadable puis darrein continuance, though it may have arisen since the last continuance. This is not like the case of a bankrupt defendant who obtains his certificate after issue joined, but before trial, which would be clearly a matter arising since the last continuance. If the defendant here had paid the bond debt, since the last continuance, but before trial, that payment would be an answer to this action, as a plea puis darrein continuance. But here the defendant is obliged to resort to a fiction by saying, that though the judgment was signed as of *Trinity* Term, yet it was not really entered up until the 2d *August*, which is a fiction against the fact. Now my difficulty is, whether on the 2d *August* there was a regular confession of the action, and whether the signing of the judgment on that day was any thing more than giving an authority to the officer of the Court to enter up judgment as of the preceding term. The obtaining of the judgment is the gist of the defence, and the judgment not being obtained in *Trinity* Term, as appears by the record, the doubt I have had is whether that which is a substantial defence can by a fiction be considered as a judgment signed on the particular day mentioned. Upon the whole however I do not feel the difficulty so great as not to have been overcome by the opinions of my learned brethren, and therefore I concur with them in thinking that the judgment ought to be entered for the defendants.

Judgment for the defendants.

QUEIROZ and others *v.* TRUEMAN and another.

Where foreign merchants consigned goods, on their own account and risk, to a commission agent in this country for *sale* only, and in the letter of advice wrote "We expect that you will send us some remittances on account of the proceeds consigned to you, though they be not yet sold, as is customary, in order to encourage us thereby to send you more frequent consignments;" and the agent pledged the goods for advances to himself, he being in embarrassed circumstances:—Held, first, that the consignor might recover the net proceeds from the pawnee, deducting only so much as the agent could have retained; and second, that the shippers' letter to the agent did not amount to an authority to pledge the goods.

THIS was an action of assumpsit for money had and received by the defendants to the plaintiffs' use. Plea, non assumpsit, and issue thereon. At the trial before *Abbott*, C. J., at the *London* Adjourned Sittings after *Trinity* Term, 1820, the Jury found a verdict for the plaintiffs, damages 3796*l.* 5*s.* 8*d.*, subject to the opinion of the Court on a special case, which stated the following facts:

The plaintiffs are merchants at *Rio de Janeiro*, trading under the firm of *Queiroz* and Co. The defendants are cotton brokers in the city of *London*. Mr. *Caumont*, of *London*, carrying on the business of a commission merchant, had, many years before the transaction in question, been in the habit of receiving cotton on consignment from the plaintiffs and other foreign correspondents, to be sold by him on their account, but he had not imported any cottons on his own account. In order to dispose of those consignments he had been in the habit of employing various cotton brokers, and amongst others the defendants in this cause. The defendants were in the habit of employing Messrs. *Needham* and Co., cotton brokers at *Liverpool*, to effect sales for them, with whom they divided the commission arising upon such transactions as they were engaged in, and for whom they were responsible. In the early part of *July*, 1818, *Caumont* received a bill of lading of 165 serons of cotton, shipped by the plaintiffs in the *Aurora* from *Rio de Janeiro* to *Liverpool*, and he agreed with the defendants that they should sell these cottons through the medium of Messrs. *Needham* and Co., together with certain other cottons, but which were not the property of the plaintiffs, consigned to him by the same vessel. On the 15th *July*, 1818, *Caumont* wrote a letter to the defendants, inclosing four bills of lading of the cotton before mentioned, and desiring that they would send them to *Needham* and Co.

and request them to do the needful as to the sale of the cottons. The bill of lading of the 165 serons of cotton belonging to the plaintiffs, which was enclosed in the letter last mentioned, was dated at *Rio de Janeiro*, the 25th *April*, 1818, and stated that the cotton, namely, two serons marked *Q.* and *S.*, and 163 serons marked *Q.* and *C.*, were shipped by *Quieroz* and Co. and were to be delivered in their name, and on their account and risk, to *Caumont*, or to his order, paying the freight and other charges therein mentioned. This bill of lading was endorsed by *Caumont* specially to the defendant, and by them to *Needham* and Co. On the same 15th *July* the defendants wrote to *Needham* and Co., enclosing the four bills of lading, and in that letter was the following passage:—" When these cottons are sold, the proceeds must go to our credit. Indeed, you are to know no other persons than us in the business, as we shall have to advance on them." On the 10th *September* following, *Caumont* wrote to the defendants in the following terms:— " According with what we mutually agreed together respecting the advances which I requested you to make me on the undermentioned cotton, consigned on my account and under your care, to *Needham* and Co. of *Liverpool*, I have drawn upon you 1500*l.* under yesterday's date at two months, and 1500*l.* same date at three months, to which I request your acceptance, placing the same to your credit when due, and against the net proceeds of the cotton." The letter then contained an enumeration of the different parcels of cotton, included in the four bills of lading before mentioned, and another parcel from *Marenham*, which was consigned on his own account to *Needham* and Co. The bills of exchange thus drawn were accepted by the defendants, and duly honoured at maturity. Shortly after they were accepted *Caumont* got them discounted. On the 28th *August*, 1818, the *Aurora* arrived at *Liverpool* with the 165 serons of cotton on board, and *Needham* and Co. obtained possession of and sold the cotton at *Liverpool*, at ten days, and bills at three months, being the usual credit in the cotton trade in

1824.
Quieroz v. Trueman.

that town, according to which, at the end of ten days, bankers' bills are given not exceeding three months' date. If the bills have less than three months to run, interest is allowed for the difference of time. Bankers' bills of this description pass current at *Liverpool* as cash. On the 26th *July*, 1818, *Caumont* received bills of lading of 60 bags of cotton, the property of the plaintiffs, which were shipped by their agents in the *Riga* packet from *Pernambuco* for *London*. These bills of lading were dated 2d *June*, 1818, and the cottons were therein described as being marked *Q. F.* and *C.*, and to have been shipped by *Antonio Soares* for account and risk of *Quieroz* and Co. of *Rio de Janeiro*, and to be delivered in their name to *Caumont*. The *Riga* packet arrived in *London* with the said 60 bags of cotton on the 26th *July*, 1818. *Caumont* employed the defendants to sell them, and on the 23d *September* sent them a delivery order for the cottons, enclosed in the following letter, which was dated *London*, *September* 23d, 1818:—"Referring to my letter of the 10th instant, advising two drafts, together 3000*l.*, in anticipation of net proceeds of some cottons consigned on my account, and under your care to *Needham* and Co. of *Liverpool*, I have now to advise for the same objects, my new drafts upon you for 1200*l.* at three months date, and herewith hand you a delivery order for 60 bags *Pernambuco* cotton of mine in the *London* docks, ex *Riga* packet, on account of which I likewise draw on you 800*l.* at two months' date." The bills mentioned in this letter were accepted, and duly paid by the defendants when at maturity. *Caumont* got them discounted soon after they were accepted. The defendants got possession of the 60 bags of cotton under the said delivery order, and sold them on the 16th *December*, 1818. On the 11th *November*, 1818, *Caumont* received bills of lading of 110 bags of cotton, the property of the plaintiffs, shipped by their agent in the *Isabel*, from *Pernambuco* for *London*. These bills of lading were precisely in the same form as those of the cotton shipped by the *Riga* packet. If goods imported come from abroad on account

1824.

Quieroz v. Trueman.

of the shippers, the usage is to put the initials of the shippers in the bill of lading, in the manner pursued in the bills of lading above mentioned. If they come on account of the consignee, they are marked differently with such marks as he thinks proper to direct. The *Isabel* arrived in the port of *London* on the 16th *November*, 1818, with 110 bags of cotton on board. They were landed by *Caumont*, and entered in his own name in the *London* docks, and the defendants were employed to sell them. On the 10th *December* the defendants sold 60 of the bags, and on the 16th the remainder. On the 1st *January*, 1819, *Caumont* wrote to the defendants as follows:—"According to our verbal agreement, I request your giving to the bearer of this a check for 1000*l.* on account of cotton which you have sold for me, and of which you have received the delivery orders." On the same day the defendants gave *Caumont* a check on their bankers for 1000*l.*, which was duly paid. On the 9th *January*, *Caumont* stopped payment, and on the 4th *February* a commisson of bankrupt was sued out against him, under which he has been duly declared a bankrupt. The cotton by the *Aurora* was sold in four parcels, on the 21st *September*, the 27th *November*, the 28th *November*, and the 4th *December*, which were respectively paid for by bills, becoming due on the 4th *February*, 7th, 8th and 17th *March*. The net proceeds amounted to 1506*l.* 15*s.* 5*d.* from which *Caumont*, as between him and the plaintiffs, was entitled to make certain charges, whereby the amount would be reduced to 1458*l.* 12*s.* 8*d.* The cottons by the *Riga* packet were sold on the 16th *December*, 1818, on the terms of cash in one month, discount one and one half per cent. The net proceeds amounted to 790*l.* 11*s.* 11*d.*, from which *Caumont*, as between him and the plaintiffs, was entitled to deduct certain charges, whereby the amount would be reduced to 696*l.* 13*s.* 2*d.* The cotton by the *Isabel* was sold at the same time, and on the like terms. The net proceeds amounted to 1498*l.* 16*s.* 4*d.*, from which sum *Caumont*, as between him and the plaintiffs, was entitled to deduct

1824.
QUIEROZ v. TRUEMAN.

charges by which it would be reduced to 1280*l.* 4*s.* 2*d.* On the 18th *September*, 1819, the defendants were, for the first time, called upon by the plaintiffs to account to them for the proceeds of the cotton, so sold as aforesaid. The plaintiffs wrote to *Caumont* on the 9th *May*, 1818, enclosing a bill of lading and invoice of the 165 serons of cotton by the *Aurora*, saying—" We expect that you will send us some remittances on account of the proceeds consigned to you, though they be not yet sold, as is customary, in order to encourage us thereby to send you more frequent consignments." On the 9th *December*, 1818, *Caumont* sent a remittance to the plaintiffs of 1250*l.*, but of that sum only 823*l.* 14*s.* 7*d.* was referable to the consignments above mentioned. Account sales were rendered by the defendants to *Caumont* of the 165 serons by the *Aurora*, on the 8th *January*, 1819, and of the 60 bags by the *Riga* packet, and the 110 bags by the *Isabella*, on the 18th of the said month. The balance of accounts between *Caumont* and the defendants was settled between the defendants and *Caumont's* assignees on the 5th *March*, 1819, and the sum of 135*l.* amount thereof, was then paid to the latter. The balance arose from the sale of other goods besides those belonging to the plaintiffs. The sum of 3796*l.* 3*s.* 8*d.*, for which the verdict was taken, is the amount of the net proceeds of the three consignments, but, as between *Caumont* and the plaintiffs, they would only be entitled to a balance of 2611*l.* 15*s.* 5*d.*, in estimating which, credit is given for the 823*l.* 14*s.* 7*d.* remitted by *Caumont* to the plaintiffs on the 9th *December*, 1818. The question for the opinion of the Court is, whether the plaintiffs are entitled to recover.

Campbell for the plaintiffs. There is no reason either in law or justice why the plaintiffs should not recover 2611*l.* 16*s.* 5*d.* the balance upon these three several transactions. Indeed it is difficult to imagine what defence can be set up to the action. These were the goods of the plaintiffs, and they were sent to *Caumont* for the purpose of being sold on

the plaintiffs' account. The defendants were employed as mere brokers in the transaction to sell the goods. They have sold them, and have got into their possession the whole proceeds of all the consignments. The question is, whether it can be said that the defendants have paid the money to *Caumont*, or whether they have a right to set off, as against the plaintiffs' demand, a debt due from *Caumont* to them. If they can shew that they have paid *Caumont*, or that, as against the plaintiffs, they have a right to set off the debt due from him to them, that will be an answer to the action; but if they can make out neither of these propositions, then this is to be considered money of the plaintiffs in their hands, and for which this action is maintainable. It is perfectly clear from the facts of the case, that the defendants never paid over the proceeds of the cotton to *Caumont*. Then how can it be said that the defendants have a right to set off, as against the demand of the plaintiffs, the debt due to them from *Caumont*? It must be conceded that if the plaintiffs had given *Caumont* an authority to pledge the goods, and in the exercise of that authority he had pledged them with the defendants, they, as pawnees, would have a lien on the goods for their advances, and they could only be called upon for the excess beyond the amount for which the goods were taken as a security. The question then is, whether *Caumont* had any authority to pledge. It will not be disputed on the other side, that by the law of *England*, a factor cannot pledge the goods of his principal. The cases of *Patterson* v. *Tash* (*a*) and *Martini* v. *Coles* (*b*), are direct authorities to shew that a factor for sale cannot pledge. It may perhaps be said, that the correspondence between the plaintiffs and *Caumont* amounts to an authority to pledge the goods, and justifies the pawnee in retaining them as a security. But no such authority either express or implied is to be collected from the plaintiffs' letter. They merely say "We expect that you will send us some remittances on account of the proceeds consigned to you,

(*a*) 2 Strange, 1178. (*b*) 1 M. and S. 140.

1824.

Quieroz *v.* Trueman.

though they be not sold, as is customary, in order to encourage us, thereby, to send you more frequent consignments." The meaning of this letter is no more than an intimation that the plaintiffs expect remittances out of *Caumont's* own funds, in anticipation of the sales. It does not amount to an authority to pledge. If, indeed, *Caumont* had come under acceptances for the amount of the goods before sale, it might be said, with some colour of reason, that in order to pay the bills when they became due, an authority to raise money by pledge for that purpose might be implied. But it has been settled in several cases that the circumstance of the consignor having drawn bills upon his consignments, and those bills being accepted by the factor, makes no difference, and gives the latter no power to pledge: *Graham* v. *Dyster* (*a*), *Kuckein* v. *Wilson* (*b*), *Gill* v. *Kymer* (*c*), and *Duclos* v. *Ryland* (*d*).—Here the Court stopped him and called upon

D. F. Jones, contrà. On the part of the defendants it must be admitted in the outset, that whatever view the Court might take of the question, if it were res integra, it is now too late to dispute the proposition that a factor cannot pledge the goods of his principal, and that it is no defence by the pawnee of the factor, as against the principal, that he had advanced money upon the goods, if the principal has thereby sustained damage. The cases upon this subject were brought together and fully discussed in *Martini* v. *Coles,* and there, after a very learned argument, the Court were of opinion, that whatever might be the convenience and expediency of a different rule of law, yet they felt themselves bound by the current of authorities to hold, as a general proposition, that a factor cannot pledge the goods

(*a*) 2 Stark. 21. (*b*) 4 B. and A. 443.

(*c*) 5 J. B. Moore, 503, S. C. reported by the name of *Fielding* v. *Kymer* in 2 B. and B. 639.

(*d*) T. 2 *Geo.* IV. in K. B. Not in the Reports of this Court; but see a very full account of it in a note to *Gill* v. *Kymer,* in the 5th vol. of Mr. *Moore's* Reports, p. 518.

of his principal. Admitting that that general doctrine cannot now be controverted, still, if it appears that the principal has given any authority to his factor to pledge, or if no injury is done to the principal by advances made to the factor, the general rule does not apply. Now, in the first place, the letter written by the plaintiffs to *Caumont*, on the 9th *May*, 1818, amounts to an authority to pledge. The consignor of goods has no right to receive, from his factor, the proceeds of his goods, until they are sold, or until the accounts are made up; but here the plaintiffs desire to have remittances in advance. Supposing, in point of fact, advances had been made by *Caumont* himself, to the plaintiff, upon these consignments, there could be no doubt that if the goods were not sold, he would have a lien upon them for such advances. It can, therefore, be no injury to the principal whether the advances be made by the factor himself, or by any other person who may chuse to lend the money. The question then is, whether this letter, written by the plaintiffs to *Caumont*, did not authorize him to shew it to any body else, and thereby raise money upon the faith of the authority there given. [*Abbott*, C. J. But a prudent person advancing his money on the faith of such a letter would take care that the money went to the person for whom it was intended.] Still, if the plaintiffs expected that remittances should be sent to them beforehand, whether the goods were sold or not, they must take the consequences of such a general authority. This case is distinguishable from *Gill* v. *Kymer*, where the Court of Common Pleas were of opinion, that the mere circumstance of the principal's drawing bills against the proceeds of the goods was not sufficient to take the case out of the ordinary rule. The case there proceeded on the notion that the bill was to be paid out of the proceeds of the goods *when sold*. That was merely payment by anticipation, and therefore this case is distinguishable from that, because here remittances are required in advance, whether the goods are sold or not. On this ground then there is sufficient in the case to shew

1824.

QUIEROZ v. TRUEMAN.

that *Caumont* had authority to raise money upon the goods, in order to comply with the plaintiffs' request to have advances. Then, secondly, have the plaintiffs been damnified by what has taken place between *Caumont* and the defendants? The advances made by the defendants did not place the plaintiffs in a worse situation than they would have been if the defendants had had nothing to do with the transaction, and therefore they cannot complain of what has taken place. There are three different consignments, by three different vessels. With respect to the first, it appears that the cottons sent by the *Aurora* were sold on the 4th *December* upon the terms of giving bills at three months, in ten days from that time, which bills are considered as cash in *Liverpool*. But for the employment of the defendants to sell the goods, *Caumont* might, at the expiration of those ten days, have demanded the bills, and by that means have obtained the whole of the proceeds. It follows then, that no injury has been worked to the plaintiffs by the defendants, because *Caumont* might have been in a situation to claim the whole proceeds before he became a bankrupt. Then, as to the consignments by the *Riga* packet and the *Isabella*, they stand on a totally different footing, because it does not appear that the defendants ever saw the bills of lading of those consignments, and non constat that they knew *Caumont* to be a mere factor in the transaction. Without knowledge of that circumstance, the advance of the money upon them by him, under such circumstances, is an answer to that part of the case.

ABBOTT, C. J.—The sum in dispute being large, the Court is not surprised that every struggle should be made by the defendants to retain it in their hands. All that the learning of an experienced counsel could do for the defendants has been done on the present occasion. The principle on which this case is to be decided is one not of modern introduction, and in several recent cases has been recognized and acted upon, namely, that a factor cannot by law

pledge the goods of his principal. Some doubts having been suggested lately with regard to the expediency of that rule of law, I think it right to express my opinion, that I think it is a rule of law which is highly expedient, and is one of the greatest safeguards which foreign merchants have in dealing with the merchants of this country, in sending their goods here for sale, and one that I should be sorry (if I may be permitted to use such an expression sitting here judicially) to see altered in any case whatever. That being the rule of law, it is perfectly clear, from the facts here found, that the defendants had received all these goods (without distinguishing one parcel from another) as and for a pledge for monies advanced by them to *Caumont*. I do not know that it is material to ascertain whether the defendants, in point of fact, knew at the time they advanced the money, and received the goods, that *Caumont* was not the real owner, for if they had the means of knowledge, it seems to me that is quite sufficient to render them liable. They had the means of ascertaining, by the bills of lading, in what situation *Caumont* stood, and having such means, without resorting to them, I am of opinion, that the blindness of one party ought not to be allowed to prejudice the rights of another. This is a proposition which cannot be disputed. I think, therefore, that the distinction attempted to be taken between the goods sent by the *Aurora*, and those sent by the *Riga* packet and the *Isabel*, is not well founded. But then it is further argued, that the plaintiffs are not prejudiced by the advances made by the defendants to *Caumont*, for it is said that if the goods had been sold by *Caumont*, without the intervention of the defendants, all the proceeds of the goods must have come into the hands of *Caumont* prior to the time at which he committed an act of bankruptcy, and consequently the plaintiffs would have been in as bad a situation as if the lien now claimed by the defendants were allowed. Now I do not see so clearly that the proceeds would have come into the hands of *Caumont*, even if the goods had not been pledged; at least I think it very unlikely upon the facts

1824.

QUIEROZ v. TRUEMAN.

found in this case. I think it is very probable that if the defendants had not, in the month of *September*, consented to advance 3000*l.* by their acceptances to *Caumont*, he would have stopped payment in that month, and then the plaintiffs would have been safe. It is one of the greatest mischiefs to trade and commerce to allow temporary relief o persons in *Caumont's* situation, for it is infinitely better for all parties that a man in insolvent circumstances should at once declare his insolvency, and distribute his effects amongst all his creditors rateably, than go on for a short time, struggling against pressing difficulties, and then relieve some creditors at the expense of others. It does not, therefore, follow, that if the defendants had not been the persons immediately employed to sell the goods, the plaintiffs would not have sustained damage through their means. We have it in proof that the defendants had received the proceeds of these goods, and had not paid the amount to *Caumont*. It appears, however, that prior to that time, when they could not have been called upon to pay the proceeds, they had advanced money to *Caumont* upon a pledge which was made by a person who had no authority to that extent. I cannot consider the letter written by the plaintiffs to *Caumont*, in *May*, 1818, saying that they would expect "remittances on account of the proceeds," as giving him an authority to pledge their goods. Putting such a construction as that upon the letter would be contrary to the manifest intention of the parties, and by no means warranted by the terms of the letter itself. I think, therefore, that the plaintiffs are entitled to have a verdict entered, giving the defendants credit for the sum which *Caumont* actually remitted on account of the goods, and for any charges he would have been entitled to make. A verdict, therefore, must be entered for the plaintiffs for 2611*l.* 15*s.* 5*d.*

BAYLEY, J.—It has been repeatedly decided, for the security of foreign merchants, that a factor receiving goods by consignment from abroad for sale cannot pledge, and

that taking goods from a factor by pledge does not bind the interests of the foreign proprietor. I cannot help thinking, that that principle of law has greatly contributed to increase the foreign commerce of this kingdom, by holding out to the merchant abroad the security, that if the factor exceeds his authority and goes beyond his powers, and trusts by way of pledge another merchant or any other person disposed to advance money upon his goods, he shall not be prejudiced in his rights. I entirely agree with my lord in saying (as far as I can judge upon a question of policy) that there is no reason why that rule of law should be altered, more especially when we consider the serious consequences which might result from its infringement. The rule of law upon this subject is founded on a plain principle of reason, namely, that he who gives credit or trusts at his peril, should take care to see that the person whom he trusts has authority to bind the rights of others, and endeavour to make himself secure, by attending to the question whether the party who has the apparent, has the real power of dealing with another man's goods. This duty may be easily performed, because the means of acquiring such information are accessible. Whenever goods are consigned from abroad, a person who is called upon to make advances upon them has an opportunity of knowing on what terms they are consigned, by referring to the bill of lading and desiring to see the letters of advice. In this case the defendants had knowledge of the terms on which the goods were consigned to *Caumont*, or at least they had the means of ascertaining the terms. In many instances it is impossible merely from the bill of lading to ascertain whether the goods are consigned on account of the shipper or the consignee. But here the defendants had the opportunity of knowing that the goods were sent to this kingdom not on the account and risk of *Caumont*, but on the account and risk of the plaintiffs, and therefore the defendants made these advances either with actual knowledge, or with the means of knowledge in their power, that *Caumont* had no

1824.

QUIEROZ v. TRUEMAN.

right to pledge. If they had the means of knowledge, then this case goes greatly beyond the ordinary class of cases of pawnees, and consequently the defendants cannot set up the advances they have made, as a defence to this action, unless it can be shewn that *Caumont* had a specific authority to pledge. Then, had he authority to pledge? The letter of the 9th *May*, 1818, which has been relied upon, certainly imports no such authority. All that it requires is that *Caumont* will make advances out of his own funds. But supposing that letter amounted to an authority to raise money upon the goods, what was the person advancing the money bound to do? Upon such a transaction, he would say to *Caumont* "you have but a limited authority to pledge the goods; you have no authority to pledge for purposes of your own, but for the purpose of remitting money to your principals, and therefore I will take the pledge provided I see that the remittances are duly made." And if these defendants had, upon advancing the money to *Caumont*, stipulated that he should remit the amount to the plaintiffs, they would have been perfectly safe; but having trusted him beyond the bounds of his authority, they have trusted him at their own peril. Then it is said, that the plaintiffs have not been dammified, and if they be not, I agree that they cannot recover in a court of justice. But it seems to me that they have been dammified to the full amount which they now seek to recover. My Lord Chief Justice has pointed out one of the mischiefs resulting from making advances to persons in insolvent circumstances. *Caumont*, who was perfectly insolvent, was enabled by the defendant's means to continue longer in business, than without their assistance he was capable of doing. But independently of that, supposing this money to have been advanced upon his own credit, in what situation would these plaintiffs have been? On the 14th *December*, bills must have been given by the purchaser of the goods and put into the hands of *Caumont*. Whether they would have been made payable to him or to the plaintiffs, it is not material to inquire. Assuming that they

would have been made payable to him, he could not as an honest man have endorsed them away, and the only thing he ought to have done would have been to keep them for the benefit of the plaintiffs, and if he had done that, they would have received the produce when the bills became due. It appears that they would have been due in the month of *March*, but though *Caumont* had committed an act of bankruptcy before then, still if they remained in his hands, they would have enured for the benefit of the plaintiffs. Therefore, as it seems to me, it is clear that the plaintiffs have been damnified to the full extent of these bills, for we are not at liberty to presume that *Caumont* would have acted dishonestly by them. Then as to those goods which were to be paid for in cash on the 16th *January*, the defendants knowing the situation in which *Caumont* stood, as a factor, and knowing that he had then become bankrupt, might have refused to pay the money into his hands, and have reserved it for the benefit of the plaintiffs. But the defendants by making anticipated payments have deprived the plaintiffs of that advantage. The plaintiffs, therefore, have in my opinion been damnified to the amount of the net proceeds of these consignments, minus the deductions which *Caumont* as a factor would have been entitled to make, and consequently this action is maintainable for the balance now claimed.

HOLROYD, J.—I am of opinion that the advances made by the defendants did not amount to the payment of these goods, and that at the time when they were sold by the defendants, they were to be considered as the property of the plaintiffs, to whom the proceeds by law belonged. The advances were made before the ship itself had arrived, and consequently could not be considered as payment of the value, but as a mere loan. The defendants having afterwards received the proceeds of the property, and not having paid the money either to *Caumont* or the plaintiffs, they are responsible for the amount in this action. I agree with

1824.

QUIEROZ v. TRUEMAN.

the rest of the Court as to the policy of the law of principal and factor, in its application to the present case. The plaintiffs' letter which has been relied upon does not in my judgment amount to an authority to pledge, or take the case out of the general rule of law.

LITTLEDALE, J. declined giving any opinion, having been of counsel in the case when at the bar.

The postea was ordered to be delivered to the plaintiffs, and the verdict to be entered for 2611*l.* 15*s.* 5*d.*

J. HAMERTON *v.* J. STEAD.

Where sole tenant from year to year, before the termination of his tenancy entered into an agreement with his landlord for a lease, to be granted to him and another jointly, and both entered upon and occupied the premises jointly:—Held, that the first tenancy was determined though the lease was never executed pursuant to the agreement.

THIS was an action of trespass for breaking and entering a mill, dwelling-house, close, &c. of plaintiff, situate at *Wrexham*, in the county of *Flint*, evicting him therefrom, and keeping him out of possession. Plea liberum tenementum. Replication, that before the said time when &c. to wit, on &c. defendant demised the premises in question to plaintiff as tenant from year to year, by virtue of which demise plaintiff entered, and was possessed, and continued so possessed until and at the said time when &c. Rejoinder, that after the making of the said demise in said replication mentioned, and before the said time when &c. the said tenancy, and the estate and interest of plaintiff in the demised premises in which &c. wholly ended and determined. Surrejoinder, that the tenancy &c. did not end and determine in manner and form as alleged in the rejoinder. Issue thereon. At the trial before *Garrow* B. at the last *Lent* Assizes for *Shropshire*, the case was this:—The plaintiff had been in the occupation of the premises in question, as

An occupation of premises, pending the execution of a lease, constitutes the relation of landlord and tenant, and will entitle the latter to sue the former upon a quantum valebat, although no distress for rent can be made.

1824.



HAMERTON v. STEAD.

tenant to the defendant from year to year, under a letting which commenced on the 1st *May*, 1810. On the 25th *September*, 1815, the defendant gave him notice to quit on the 1st *May* then next ensuing. The plaintiff having entered into a treaty for a copartnership with one *John Moore*, in the business of a miller, application was made to the defendant to let the premises to them jointly. Accordingly on the 10th *October*, a written agreement was entered into, by which the defendant agreed to let and demise the premises to the plaintiff and *Moore*, to hold from the 1st *November* then next, for the term of seven years, at the yearly rent of 159*l*. payable half-yearly, viz. on the 1st *May* and 1st *November* respectively. The plaintiff and *Moore* agreed on their part to pay the rent and all taxes, except the landlord's property tax; and the defendant undertook to put the premises in tenantable repair as soon as conveniently might be; and the plaintiff and *Moore* further agreed to keep and maintain the premises in tenantable repair, and leave them in a tenantable condition at the end of the demised term. The agreement then contained the following concluding article, "and it is hereby agreed that a lease of the said premises shall be forthwith drawn, in which shall be contained the usual covenants, and particularly that the said *J. Hamerton* and *J. Moore* shall not let, set, or assign the said premises or any part thereof, without the consent of the said *J. Stead* in writing being first had and obtained." This agreement having been signed by all the parties, the plaintiff and *Moore* were let into the possession of the premises, and continued to occupy them jointly until the month of *April*, 1816, when they quitted. A negotiation having been entered into without effect, for the purpose of inducing the plaintiff and *Moore* to surrender the premises, the defendant in *June* in the same year, being unable to obtain payment of some rent in arrear, committed the alleged trespass by taking possession of the mill and other parts of the premises. The question at the trial was whether the agreement for a lease operated as a determination of the preceding

1824.
HAMERTON
v.
STEAD.

demise to the plaintiff alone, as tenant from year to year. For the defendant it was contended that the agreement was in effect a lease, inasmuch as it contained words of present demise, and therefore put an end to the original tenancy; but supposing it not to be a lease, yet inasmuch as *Moore* had been put into possession under it, and occupied jointly with the plaintiff, it operated in law as a surrender of the original tenancy. Contrà it was insisted that as there was no actual surrender of the plaintiff's interest, the agreement, which was merely an executory instrument, could not by operation of law work a surrender or termination of the old tenancy, and therefore the action was maintainable. The learned Judge inclined to think the first tenancy had been surrendered by operation of law, but reserved the question, and a verdict having been found for the plaintiff, *Campbell*, in *Easter* Term last, obtained a rule nisi to enter a nonsuit; against which

W. E. Taunton now shewed cause. The issue on the pleadings was whether the original tenancy of the plaintiff had or had not been determined at the time when the alleged trespass was committed. The agreement in question cannot be considered as evidence of the determination of the previous tenancy, unless the Court shall hold that it amounts to a lease, or a surrender in law of the plaintiff's original interest. There was no actual surrender of the previous tenancy, and if there was not, then this agreement cannot operate as a surrender in law, unless it was an actual lease. It is not a lease, because in terms it is a mere executory instrument—a mere treaty or contract for an intended lease. A subsisting legal demise cannot by implication end and determine, unless there be a new legal contract for another demise inconsistent with the first. If this then be not a lease the original tenancy was not determined and consequently this action is maintainable. For this *Roe* v. *The Archbishop of York* (a) is an express authority. This

(a) 6 East, 86.

1824.

HAMERTON v. STEAD.

instrument had only an agreement stamp, and if it were intended to operate as a lease, it ought to have had a lease stamp. It may be true, that it contains words of present demise, but still those words are not sufficient to give it the character of a lease. In its very terms, it imports nothing more than an agreement between the parties to do something hereafter, which is to consummate and perfect their intentions. It is not a final conclusive contract, but a matter in fieri. The principle to be collected from the cases on this point is, that if an agreement to demise premises be entered into, but it appears to have been the manifest intention of the parties that something should thereafter be done, to secure the interest of either, the instrument does not amount to a lease, but merely a contract for a lease to be granted in future. *Goodtitle* v. *Way* (*a*), *Doe* v. *Clare* (*b*), *Tempest* v. *Rawling* (*c*), *Roe* v. *Ashburner* (*d*), *Doe* v. *Smith* (*e*), and *Dunk* v. *Hunter* (*f*). Now it is clear that this case comes within the principle of those authorities. The defendant meant to reserve to himself the right of re-entry if *Hamerton* and *Moore* should assign or let the premises without his leave, and also that they should be bound by the usual covenants contained in a lease. But this instrument contains no reservation of the right of re-entry, nor any of the covenants usual in a lease. It follows then, that it does not amount to a lease, inasmuch as it was in the contemplation of the parties to execute some ulterior security, which was to be the final and conclusive contract between them, and therefore there was no determination of the preceding demise to the plaintiff alone.

Campbell (with whom was *Russell*) contrà. If the agreement of the 10th *October*, 1816, be a lease, then there can be no question that the previous tenancy was determined, because the acceptance of a lease clearly operates as a surrender of the former interest. Now the agreement contains

(*a*) 1 T. R. 735. (*b*) 2 T. R. 739 (*c*) 13 East, 18.
(*d*) 5 T. R. 163. (*e*) 6 East, 530. (*f*) 5 B. and A. 322.

words of present demise conveying a present interest, and it contains the usual covenants which are to be found in leases; and it is an established rule of law that an instrument giving a right to the possession and profits of land amounts to a lease. Then the question is, whether this has been accepted. Of that there is no doubt, because all the parties signed it, and the plaintiff and *Moore* actually entered into possession and continued to occupy under it until *April*, 1816. The act of signing is decisive of acceptance. The Court must look to the intention of the parties, and here the intention was that the plaintiff and *Moore* should enter and occupy jointly on the 1st *November*, which they did accordingly. [*Bayley*, J. There is a stipulation in the agreement that the defendant shall put the premises in repair as soon as convenience will permit. Would it not then be a good reason for refusing to accept the lease, that the defendant had not put the premises in repair? My doubt is whether that stipulation does not shew that it was not the intention of the parties that this agreement should operate at all events as a lease, and whether the parties would not have been entitled to say "I will not bind myself by a lease until the premises are put in repair."] It would not lie in their mouths to say it was not a lease, after they had accepted and occupied the premises by virtue of it. But at all events they might have brought an action against the landlord for not putting the premises in repair, if he refused so to do. Assuming, however, that this is only an agreement for a lease, yet coupled with the fact that the plaintiff and *Moore* had taken possession and occupied the premises, it will then operate as a surrender of the former tenancy, for an act inconsistent with the former tenancy operates as a surrender. Suppose before this trespass had been committed, the plaintiff and *Moore* had paid rent to the defendant, could they afterwards say that they were not joint tenants? If there was a joint tenancy, there would be an end to the separate tenancy by the plaintiff alone. Here is an actual occupation by two persons under an agreement for a lease,

and therefore whether it be a lease or not, enough is shewn to determine the former tenancy. The Court stopped him.

ABBOTT, C. J.—I am of opinion that this action is not maintainable. The case of *Roe* v. *The Archbishop of York* is not an authority to govern this case. There the occupation under the second lease took place in consequence of a mistake as to its effect; and, upon its turning out that the second lease was void, it was properly held that the acceptance of such a lease ought not to operate as a surrender of the first. It does not appear in this case that the defendant refused to execute the lease according to the contract. All that appears is, that a contract was entered into by which he bound himself to grant, and by which the plaintiff and *Moore* bound themselves to accept, a lease jointly, and by virtue of which contract they were suffered to enter into possession, and continued to occupy the premises for some time afterwards. I am satisfied, under these circumstances, that although the defendant had not actually granted a lease, yet still he might have sued these two persons for use and occupation as upon a joint tenancy, although he might not have had power to distrain for the rent. It sometimes happens that parties enter into a contract for a tenancy and occupy premises according to a rent to be afterwards fixed, and in such cases though the landlord has no power of distress, still he may be entitled to sue upon a quantum valebat for use and occupation. It appears to me, therefore, that the first tenancy in this case was determined, and that the joint tenancy under the agreement, with the concurrence of the plaintiff, amounted to a surrender in legal effect and operation.

BAYLEY, J.—It is a rule of law, that a landlord cannot enter to distrain unless there is a rent fixed between the parties, and that was the foundation of the decision in the case of *Dunk* v. *Hunter*. In that case the Court were of opinion, that as the rent was not fixed, the landlord could

1824.

HAMERTON v. STEAD.

not enter to distrain. It is clear since the statute of frauds, that there cannot be a surrender of a term for years except by an instrument in writing or by operation in law. For instance, if a person who is sole tenant takes premises jointly with another, and occupies under that taking, that is by operation of law a surrender of the first term. The case of *Roe* v. *The Archbishop of York* is wholly inapplicable. The point there decided was simply this, namely, that the acceptance of the second lease could not operate as a virtual surrender of the first, inasmuch as the second had no operation whatever in the way intended by the parties, the Court being of opinion that it was absolutely void. In the present case, it appears to me, that connecting the agreement with the actual occupation of the premises by the plaintiff and *Moore* jointly, they must be considered as standing in the relation of tenants to the defendant, and consequently the sole tenancy by the plaintiff was surrendered by operation of law. As the issue taken goes to the whole action, the consequence is that a nonsuit must be entered.

HOLROYD, J.—I am of the same opinion. The agreement in question would not put an end to the former tenancy unless there was a fresh tenancy actually created. Taking it that the document in question amounts only to an agreement for a lease, yet it appears from the entry and enjoyment under it by *Moore* and the plaintiff jointly, that an entirely new tenancy was created, either from year to year, or at will, and that, according to the case of *Mellow* v. *May* (*a*), would have the effect of terminating the old tenancy. Perhaps it could not be said that the plaintiff and *Moore* were holding at the rent stipulated in the agreement until a lease was executed, though they might be considered as holding under it. But I take it, that although the holding under the agreement might not be at the rent stipulated therein, still it would amount to a tenancy; for it is not requisite to constitute a tenancy that there should be a rent determined and

(*a*) Moore, 637.

ascertained beforehand. In the case already put by the Lord Chief Justice, a tenancy may exist although there be something to be done afterwards. Suppose a party enters upon premises under a promise that he shall have a lease, in the mean time he is to be considered as occupying in the character of tenant until the lease is granted, and although no distress could be made, still the landlord would have his remedy upon a quantum valebat, according to the circumstances of the occupation. I am, therefore, of opinion, that by operation of law the former tenancy in this case was put an end to by the plaintiff and *Moore* having the premises delivered up to them jointly before the lease was executed.

LITTLEDALE, J.—If the agreement in question operated as a lease, then it is clear that the former tenancy was determined; but if it did not, then a mere agreement for a lease, unaccompanied by other circumstances, will not have that effect. Here, however, it appears, that *Moore*, jointly with the plaintiff, entered into possession by virtue of the agreement, which makes all the difference. It is not necessary to decide whether this be a lease or not, but if parties merely enter into an agreement for a future lease, the relation of landlord and tenant is created between them. Those who occupy under it are tenants at will until the lease be carried into effect; or if rent is paid, then they become tenants from year to year, determinable either by a notice to quit as in the ordinary case, or when the lease shall be executed, which is the primary contract between the parties. If, however, no rent be paid, still as it was the intention of the parties that the relation of landlord and tenant should exist until the lease should be executed, that relation operates to determine any pre-existing tenancy. I am, therefore, of opinion, that a nonsuit must be entered in this case.

Rule absolute for entering a nonsuit.

1824.



The East India Company *v.* Tritton and others.

A. drew bills of exchange in favor of *B.* in *India*, upon the *E. I. Co.* in *London*, which the latter accepted. *C.*, as the agent of *B.*, indorsed the bills to *D.* and *E.*, under the supposed authority of a power of attorney from *B.*, which the *E. I. Co.* had inspected. *D.* and *E.* indorsed the bills to their bankers and agents, *F.* and Co., with instructions to present them for payment when due. *F.* and Co. indorsed the bills, presented them for payment when due, received the money, and paid it over to their principals, *D.* and *E.* The power of attorney from *B.* did not authorize *C.* to indorse the bills, and *B.* having died, his administrator recovered the amount of them from the *E. I. Co.* as the acceptors. The latter now brought assumpsit against *F.* and Co. upon an alleged undertaking by them that they were entitled to receive payment of the bills. The jury found, specially, that the plaintiffs paid the bills, not on the faith of the indorsement by the defendants, but on the faith of the power of attorney, and that the defendants received the money as agents, and paid it over to their principals before they knew that the first indorsement by *C.* was unauthorized:—Held, that the action could not be maintained against these defendants. *Semble*, that a subsequent indorsement of a bill by a holder does not imply a warranty by him that the former indorsement is genuine.

DECLARATION in assumpsit stated, in the first count, that before the time of making the promise, &c. hereinafter next mentioned, in parts beyond the seas, to wit, at *Fort St. George* in the *East Indies*, that is to say, in *London*, one G. G. *Keble*, by order of the Honorable the Governor in Council there, and according to the usage and custom of merchants, had made three certain bills of exchange in writing, and then and there directed the same to the Honorable the Court of Directors of the *East India Company* in *London*; by one of which said bills, bearing date 20th *January*, 1809, the said *G. G. Keble* requested the drawers thereof, at three months' sight of that second of exchange, (first or third not being paid,) to pay or cause to be paid unto one *W. Hope*, Esq., or his order, in *London*, the sum of 8,940*l.* sterling; and by one other of which said bills [here two other bills were set out, in the same form, one for 13,200*l.* and the other for 1,140*l.* sterling,] which said bills plaintiffs afterwards, to wit, on &c. at &c. upon sight thereof by one *W. Ramsay*, their agent in that behalf, duly accepted, according to the said usage and custom, and according to the form of the statutes in such case made and provided; that when the said bills became due and payable, they were presented by defendants, then being the holders thereof, to plaintiffs for payment, and that at the time of such presentment of the said several bills to plaintiffs for payment as aforesaid, each and every of the said bills purported to be indorsed by the said *W. Hope*, by one *J. Card*, as the agent for, and by

procuration of the said *W. Hope*, to Messrs. *Davies* and *Card*, by whom they were indorsed to defendants. That at the time of the presentment of the said bills for payment, defendants, according to the said usage and custom, had made their indorsement in writing upon each and every of the said bills, their names, style and firm of dealing, of *Barclay, Tritton* and Co. being thereon respectively written and then remaining thereon, and had thereby appointed the said sums of money in the said bills respectively mentioned to be paid to the bearer thereof respectively; and defendants then and there asserted and affirmed that they, defendants, were then and there entitled, as such holders of the said bills as aforesaid, to receive the several sums of money therein mentioned respectively; and plaintiffs in fact say, that they, relying upon the indorsement by defendants so being upon the said bills as last aforesaid, and upon the said assertion and affirmation of defendants, did then and there pay to defendants, so being the holders of the said several bills, the several sums of money therein mentioned, then and there amounting to the sum of 23,282*l.* 6*s.* 6*d.* It then averred that the indorsement by *Card* was made without the authority of *W. Hope*, and that before that indorsement, to wit, on 14th *March*, 1809, the said *W. Hope* had departed this life in parts beyond the seas, to wit, at &c.; and set out a grant of administration to one *James Murray* after the payment of the bills, to wit, on 13th *February*, 1812, and of administration de bonis non to one *John Murray*, on 31st *October*, 1814. It then stated that within six years next after the grant of administration to *James Murray*, an action was commenced by *John Murray* against plaintiffs for the amount of the said bills and interest thereon, in which, in *Michaelmas* Term, 2 *Geo.* 4., he recovered the sum of 35,827*l.*, which plaintiffs paid to him; of all which said premises defendants afterwards had notice, by reason whereof defendants became liable to pay to plaintiffs the last mentioned sum of money, when thereto requested, and being so liable, promised, &c. Second count averred the indorse-

1824.

The East India Company v. Tritton.

ment of the bills by defendants, and payment of them by plaintiffs on the faith of that indorsement, but omitted the assertion and affirmation of defendants that they were entitled to payment. Third count stated that defendants indorsed the bills to plaintiffs, and that plaintiffs paid them upon the faith of that indorsement. Fourth count alleged, that in consideration that plaintiffs would pay defendants, as holders, the amount of the bills, defendants promised to save harmless and indemnify plaintiffs from any loss or damage by reason of their paying the bills; set out the verdict recovered by *John Murray*, and assigned for breach that defendants had not saved harmless and indemnified plaintiffs. Fifth count alleged an undertaking and promise by defendants that they were entitled as the holders to receive the amount of the bills, and that they would save harmless and indemnify plaintiffs, with an averment that defendants were not entitled as holders to receive payment of the bills, and that they did not save harmless and indemnify plaintiffs. Sixth count set out an undertaking and promise by defendants to save harmless and indemnify plaintiffs, if defendants were not, as holders, entitled to receive the value of the bills. Common money counts. Pleas, first, the general issue; second, to the first six counts, that the action did not accrue within six years; third, to the remaining counts, that defendants did not undertake or promise within six years. Issue joined on all the pleas. At the trial before *Abbott*, C. J. at the *London* Adjourned Sittings, after *Trinity* Term, 1823, the jury found a special verdict, which stated the following facts:—The bills in question were drawn and accepted as alleged in the declaration. When they became due, they were presented for payment to plaintiffs by defendants and one *R. Barclay*, since dead, who were then bankers in *London*, and held the bills as the bankers and agents of and for Messrs. *Davies* and *Card*, as after mentioned, by the hands of one *W. Bell*, who was then clerk and servant of defendants and the said *R. Barclay*. At the time when the bills were presented for payment to plaintiffs, each bore the

following indorsements, namely, "Pay Messrs. *Davies* and *Card*, or their order, per procuration of *W. Hope, J. Card*." "Pay Messrs. *Barclay, Tritton* and Co., or order, *Davies* and *Card*." "*Barclay, Tritton* and Co." On 7th *October*, 1800, *W. Hope* executed the following power of attorney to *Card*; [the power of attorney was then set out, in the same words as in *Murray* v. *The East India Company* (*a*).] The first indorsement was written by *Card* himself, and before the bills were presented for payment, or paid, the power of attorney was produced to the plaintiffs, and inspected by them. When the power of attorney was so produced, an entry of it was made by the plaintiffs in a register kept by them in their treasurer's office, for the entry of powers of attorney intended to be acted upon in the payment of money for the plaintiffs at that office, where all payments by and for the plaintiffs were and are made. *W. Hope* died 14th *March*, 1809, but his death was not known to the plaintiffs, nor to the defendants and *R. Barclay*, nor to *J. Card*, at the time of the payment of the bills hereinafter mentioned. The bills were indorsed by *Davies* and *Card*, and the defendants, as alleged. When the bills were presented to plaintiffs by the said *W. Bell*, then being the clerk and servant of defendants and *R. Barclay*, plaintiffs paid to the said *W. Bell*, as such clerk and servant, the several sums mentioned in the bills, amounting to 23,282*l*. 6*s*. 6*d*., which were received by defendants and *R. Barclay* accordingly. The said payment of the bills by plaintiffs to defendants and *R. Barclay* was made on the faith of *J. Card's* indorsement thereon, and of the power of attorney from *W. Hope* to *J. Card*, and not on the faith of the indorsement of defendants and *R. Barclay*. Long before and at the time when the bills were so paid, *Davies* and *Card* kept a banking account with defendants and *R. Barclay*, who then carried on business as bankers in *London* in copartnership, and which *R. Barclay* died before the commencement of this action. *Davies* and *Card*, on 17th *October*, 1809, indorsed

(*a*) 5 B. and A. 204

1824.

The East India Company v. Tritton.

the bills specially to defendants and *R. Barclay*, and delivered them to defendants and *R. Barclay*, in order that they, as the bankers of *Davies* and *Card*, might, in the regular course of business, receive payment of the bills when they became due, for and on account of *Davies* and *Card*; defendants and *R. Barclay* never having had any interest in the said bills or the proceeds thereof. Defendants and *R. Barclay* received the money as the agents of *Davies* and *Card*, who drew out the whole of it on 11th *December*, 1809. The special verdict then proceeded to find that the other facts alleged in the declaration, namely, the grant of administration to *James Murray*; the grant of administration de bonis non to *John Murray*; the action brought by the latter against the present plaintiffs; the notice given to defendants of that action; the recovery of a verdict in that action; the payment of the damages by the present plaintiffs, and the notice of that payment given to the defendants, occurred as there alleged; and concluded in the usual form.

Tindal, for the plaintiffs. The plaintiffs are entitled to recover upon the count for money had and received, unless the statute of limitations, as pleaded by the defendants, is a bar to the action. Upon reference to the whole record, it is plain that the plaintiffs have been twice called upon to pay the amount of the same identical acceptances, and the question is, whether these particular defendants, having indorsed the bills, are, by operation of law, liable to refund to them the latter of those payments. Now, the indorsement of a bill by the person who presents it to the accepter for payment in the character of holder, is a warranty that he is the real holder. Where a bill, the drawer's name on which has been forged, has been paid by the accepter to an indorsee, under the belief that it was genuine, it has been held that he cannot recover the money back; but, upon this principle, that the accepter is bound to know the hand-writing of the drawer; *Smith* v. *Chester* (a). In the present case it

(a) 1 T. R. 654.

is found, by the special verdict, that the first indorsement was made without proper authority for that purpose; and the question is, whether, when such a bill has been presented to the accepter and paid by him, he is concluded by that payment. [*Bayley*, J. Were not the defendants treated throughout the transaction as the agents of *Davies* and *Card*?] It is submitted that they were not. The indorsee of a bill, in an action against the accepter, must prove the hand-writing of the first indorser; *Smith* v. *Chester*. Then, if the accepter pays the bill without demanding that proof, in the belief that the hand-writing is genuine, and that proof of it will be forthcoming if required, the very act of making that payment implies a warranty, on the part of the indorsee, that the hand-writing is genuine. Of this opinion was *Chambre*, J. in *Smith* v. *Mercer* (*a*), where he said, "The defendants have paid their money for that which is of no value; they have thereby sustained a loss, and they ought not to be permitted to throw that loss upon another innocent man, who has done no act to mislead them; and still less ought they to be so permitted where, instead of being misled by any act of the plaintiffs, they themselves have given the appearance of authenticity to the instrument by their own indorsement, which was a sort of warranty of its genuineness at a time when the forged acceptance made a part of the instrument." It is true that that case in some respects differs from the present, for there the hand-writing of the accepter was forged, and that that learned Judge, upon some points, differed from the rest of the Court; but still his opinion on this particular point applies to this case, and is deserving of great attention. Then, what are the objections raised against the plaintiffs' claim? First, that the action is barred by the statute of limitations. Second, that the special verdict finds, as a fact, that the bills were paid by the plaintiffs on the faith of the power of attorney, and not on the faith of the indorsement by the defendants. And third, that the defendants received the money merely as the

(*a*) 6 Taunt. 83. 1 Marsh. 453. S. C.

1824.

The East India Company v. Tritton.

bankers and agents of *Davies* and Co. and paid it over to them before they knew that *Card* had not authority to indorse the bills. [*Bayley*, J. And fourth, that the plaintiffs paid the money with full knowledge, or full means of knowledge, of all the circumstances of the transaction. *Abbott*, C. J. It is not necessary at present to argue the point respecting the statute of limitations.] Then as to the second objection, if there was an implied warranty that the indorsements were genuine, it was not necessary that the bills should be paid on the faith of that warranty. If one supply goods to *A.*, and *B.* give a warranty for the payment of the price, *B.* could not say in answer to an action against him on his warranty that when the goods were supplied the credit of *A.* was better than his own, and, therefore, that they must have been sold on the credit of *A.* and not on the credit of the warranty. Now that is the present case; for here though the plaintiffs paid the bills on the faith of the indorsement made by *Card* under the power of attorney executed by *Hope* to him, still as the indorsement by the defendants operated as a warranty that the prior indorsement was genuine, that is no defence to the present action. Then upon the third point it will be said, that as the defendants received the money in their character of agents to *Davies* and *Card*, and paid it over to them before they had any knowledge of the invalidity of *Card's* indorsement, this is the common case of money received by an agent, and paid over by him bonâ fide to his principal, and, therefore, not recoverable from the agent; and *Sadler* v. *Evans* (*a*) will be cited in support of the position. But there the money was paid to the agent as such, and all parties knew him to be merely an agent, as appeared by the receipt given in the transaction; whereas here, there is no evidence that the plaintiffs did or could know that the defendants were not acting as principals. Appearing, therefore, as principals, though in fact they were only agents, the defendants are liable to refund the money thus wrongfully paid into

(*a*) 4 Burr. 1984.

their hands. *Snowdon* v. *Davis* (a). [*Bayley*, J. There the defendant took the money wrongfully in the first instance; it was not a voluntary payment to him.] The judgment of *Mansfield*, C. J. there, in which he says, "the plaintiff pays the money under terror of process, to redeem his goods, not with an intent that it should be delivered over to any one in particular," at least shews that the mere act of paying the money over to the principal does not protect an agent from an action under such circumstances.

Cambpell, for the defendants, was stopped by the Court.

Abbott, C. J.—Upon the facts found in this special verdict, I am of opinion that this action cannot be maintained. The plaintiffs have not paid the money inadvertently. Previous to their paying it, they took such measures as they deemed adviseable or necessary to satisfy themselves that they were safe in making the payment. They obtained a sight of the power of attorney, and acquainted themselves with its contents; an advantage which was not afforded them by the defendants: for they did not produce, nor does it appear that they ever saw the power of attorney, or had any knowledge of its existence. Then, leaving the question of agency entirely out of consideration, it is plain that the defendants innocently, bonâ fide, and without any fraudulent intention, have received from the plaintiffs a sum of money, paid unquestionably by the latter in their own wrong, but paid after inquiry into the circumstances of the transaction, with knowledge, or the means of knowledge, of all the facts of the case, and not upon the faith of the indorsements appearing on the bills. In point of fact there can be no doubt that the defendants acted throughout merely as agents; but my opinion is not grounded on that circumstance, but proceeds entirely upon the short ground already stated, and upon which it seems to me that the plaintiffs cannot maintain this action.

(a) 1 Taunt. 359.

1824.

The East India Company v. Tritton.

Bayley, J.—My opinion in this case is also formed without any reference to the question of agency, and exclusively upon the general and established rules of law. The utmost that the plaintiffs can say in support of their claim is, that both parties are equally innocent of the loss that has been sustained, and, therefore, that they ought not to suffer. But the defendants may say the same, and with more justice, for, in such a case potioi est positio possidentis, and the plaintiffs certainly had means of knowledge which the defendants had not, and chose to pay the bills after they had used those means to their then satisfaction. It seems to me, therefore, that very great injustice would result from our holding that the plaintiffs could recover in this action. The defendants did not take the bills upon the faith of their indorsement by *Card*, because there were the intermediate indorsements of *Davis* and *Card*. The plaintiffs, before they paid the bills, were bound to look at the power of attorney, and the law casts upon them the responsibility resulting from an inspection of that instrument, because the defendants neither were, nor, indeed, by possibility could be at all acquainted with its contents. I am not at the present moment prepared to admit, as a general principle, that every indorser of a bill warrants the genuineness of the prior indorsement, and it seems to me that such a general rule might be attended with much mischief. It is not, however, necessary to decide that question in this case, because the plaintiffs, before they paid the bills, did see and examine the power of attorney on the authority of which they were indorsed by *Card*, and, therefore, it was for them to judge for themselves whether that power of attorney did or did not authorize that indorsement. They were of opinion that it did; in point of fact it certainly did not: but the defendants were not responsible for that mistake; the fault lay with the plaintiffs, not with the defendants, and upon the plaintiffs, not the defendants, the consequent injury must fall. But let us suppose for the moment, that the defendants were principals in the transac-

tion, and dealt with the plaintiffs as such. In that case, if the plaintiffs, in the year 1809, had refused to pay the bills, the defendants would then forthwith have had recourse to *Davis* and *Card*, which now they cannot do, for their remedy against them is gone by lapse of time. I am, therefore, of opinion, that in either view of this case, as well upon general legal principles, as upon justice and conscience, that the defendants are entitled to retain this money, and that the present action cannot be maintained against them to recover it back.

Holroyd, J.—I entirely concur in the exposition already given by the Court of the law and of its application to the facts of this case. *Bilbie* v. *Lumley* (*a*) and the other cases of that class have decided, that money paid voluntarily, with knowledge, or the means of knowledge of the facts, cannot be recovered back on account of ignorance or mistake of the law (*b*). The plaintiffs are precisely in that situation, and come fully within the operation of that rule; therefore they cannot maintain this action. The defendants believed very naturally that they were entitled to receive the proceeds of these bills, and under that belief did receive them. It turned out that *Card* had no authority to indorse the bills, but the defendants cannot be prejudiced by that; they were mere agents, and had no means of defending themselves; for they were neither bound, nor had they any legal right to refuse payment of the bills, if an action had been brought against them to enforce it.

Littledale, J.—Much stress has been laid upon the argument that the defendants had warranted the authority of the indorsement of these bills. There is certainly no express warranty, nor am I aware of any authority for saying that the law in such a case will imply one. The dictum of *Chambre*, J. in *Smith* v. *Mercer*, does not go that length, for he only says that the indorsement by the de-

(*a*) 2 East, 469. (*b*) See *Morgan* v. *Palmer*, ante, vol. iv. 283.

1824.

The East India Company v. Tritton.

fendants was "a sort of warranty" that the bill was genuine. In a case like this we are to judge from the facts found, whether there is or is not any warranty; and I quite satisfied that the facts here will not justify us in saying that there was any warranty. Neither did the plaintiffs pay the money on the faith of any warranty; they paid on the faith of the power of attorney, which they had previously seen, and of the indorsements as they appeared on the bills; and having so done, they are bound by their own voluntary act, and cannot recover the money from the defendants.

Judgment for the defendants.

Mayfield v. Wadsley.

Plaintiff, at *Lady-day*, 1821, gave up possession of a farm to defendant, having previously sown forty acres of it with wheat. At a meeting in the previous month, plaintiff asked defendant if he would take the wheat at 200*l.* saying, that if he would not, he should not have the farm. Defendant said he would take the wheat, and being asked to whom the dead stock should be valued, replied, "to me." Defendant afterwards undertook to pay for the wheat and dead stock on a specified day, and did pay 75*l.* on account generally, and eventually had possession of the farm, the wheat, and the dead stock. In indebitatus assumpsit for crops bargained and sold, and for goods sold and delivered:—Held, first, *per tot. cur.*, that the contract for the dead stock being distinct from the contract for the sale of the wheat, or the giving up of the farm, plaintiff might recover for that amount; second, per *Bayley* and *Holroyd*, J.s, *Littledale*, J. dubitante, that defendant having received the wheat and made a payment on account of it, plaintiff might recover for the rest of that amount; and third, per *Abbott*, C. J., that plaintiff having obtained a general verdict for several items, even if he could not by strict law recover for some of them in this form of action, still as he certainly might in another, the Court would not interfere to reduce the damages.

DECLARATION in indebitatus assumpsit for growing crops of wheat, hay, and corn, for goods bargained and sold, and for goods sold and delivered. Plea, non assumpsit, and issue thereon. At the trial before *Hullock*, B. at the last *Lent* Assizes for *Lincolnshire*, the facts proved in evidence were these. At *Lady-day*, 1821, the plaintiff quitted a farm which he had occupied, and was succeeded by *George Mayfield*, the son-in-law of the defendant. Previous to his quitting, the plaintiff had sown 40 acres of the land with wheat, and a witness who valued the crops, proved, that in *February*, 1821, the plaintiff and the defendant entered into a parol agreement, in the course of which the plaintiff asked the defendant, if *he* would take

the 40 acres of wheat at the price of 200*l.*, adding, that if he would not take the wheat, he should not have the farm; to which the defendant replied, that he would take the wheat. The dead stock was then valued by the same witness at the sum of 40*l.* 8*s.* 6*d.*, and upon his asking to whom it was to be valued, the defendant replied, "*to me;*" and a threshing machine, which was upon the farm, was valued at the same time at 4*l.* 10*s.* Some time after the defendant said to the plaintiff, "Have you any objection to give *me* possession of the farm?" The plaintiff, in reply, asked the defendant when he would pay him, to which the latter answered, that if the plaintiff would meet him on the 8th *March*, he would then pay him for the wheat, and the dead stock, and the machine. It was proved that a short time before the trial the defendant had admitted that he had paid 75*l.* on account, but declared that he never would pay any more. The learned judge told the jury that if they were of opinion that the defendant had agreed to pay for the wheat to be taken by *George Mayfield*, they ought to find a verdict for the plaintiff for the full amount of his claim, because then *George Mayfield* having had the wheat, and the defendant having paid 75*l.* on account, there was a part performance of the contract. The jury accordingly found a verdict for the plaintiff for 169*l.* 8*s.* 6*d.* being the balance claimed after deducting the 75*l.* In *Easter* Term last a rule nisi was obtained for entering a nonsuit upon two grounds, first, that the evidence did not warrant the finding that there had been a part performance of the contract by the defendant, as it did not appear that the possession of *George Mayfield* was the possession of the defendant, nor that the latter had paid the 75*l.* on account of the wheat; and second, that even if there had been a part performance, still the action could not be maintained by the fourth section of the statute of frauds, the bargain for the stock being parcel of a contract relating to the sale of an interest in land. Against that rule

1824.

MAYFIELD v. WADSLEY.

Denman, C. S. and *Pennington* now shewed cause. The defendant had possession of the farm, in construction of law, by his representative *George Mayfield*, and paid 75*l*. on account of the wheat and dead stock; he has, therefore, in part performed the contract, and cannot now rescind it. The contract has been executed, and the parties cannot treat it as a nullity, *Crosby* v. *Wadsworth* (*a*). Then the only question is, whether this is a contract for the sale of an interest in land within the fourth section of the statute of frauds; and it seems clear from decided cases that it is not. It was held in *Parker* v. *Staniland* (*b*) that a contract for the sale of a crop of potatoes, which were to be taken out of the ground immediately by the vendee, was not a contract for the sale of any interest in the land, because "he had only an easement, a right to come upon the land, for the purpose of taking up and carrying away the potatoes; but that gave him no interest in the soil." In *Poulter* v. *Killingbroke* (*c*) the plaintiff by parol agreement let land to the defendant, from which he was to take two successive crops, and to render the plaintiff a moiety of the crops in lieu of rent. While the crops of the second year were on the ground, an appraisement of them was taken by both parties, and the value ascertained. It was objected that the agreement was within the statute of frauds, but *Eyre*, C. J. held otherwise, for the special agreement was executed by the appraisement, and the price having been ascertained brought the case to that of an action for goods sold and delivered. Then, at any rate, so far as respects the dead stock, this is a mere action for goods sold and delivered, and upon that count the plaintiff is clearly entitled to recover. That was a separate contract; *George Mayfield* accepted the goods, and his acceptance was the acceptance of the defendant; therefore the contract for the dead stock was within the exception of the statute both in the spirit and the letter.

(*a*) 6 East, 602. (*b*) 11 East, 362. (*c*) 1 Bos. and Pul. 397.

1824.

MAYFIELD v. WADSLEY.

Clarke, K. C. and *Reader*, contrà. The verdict found is inconsistent with the facts of the case, because there was no evidence to shew either that the defendant contracted at all upon his own account, or that the contract made, such as it was, was executed by him. It did appear that another person, namely *George Mayfield*, took possession of the farm, but there was no evidence to connect him with the defendant, so as to render his possession the possession of the defendant; nor was it proved even that the defendant paid the 75*l.* on account of the wheat; therefore there was no performance of the contract by the defendant, and consequently no action can be maintained upon it by the plaintiff. But assuming that there was a part performance, the plaintiff's case is not strengthened, because the contract was for the sale of an interest in land, and, therefore, required by the fourth section of the statute of frauds to be made in writing. The main and original contract here was for the sale of growing wheat, and for the plaintiff's interest in the land upon which it grew, for the contract for the sale of the dead stock was an afterthought, and merely subsidiary to the first contract. Now the language of the fourth section of the statute does not except such a contract out of its provisions, nor render it binding even when partly performed, for the exception includes only such sales of goods and chattels, as would otherwise be void by the provisions of the seventeenth section. If, indeed, this had been merely a contract for the sale of goods and chattels, it might have been within the exception, and a part performance of it might have rendered it binding; but it was in substance and effect a contract for the sale of an interest in land, and as such no action can be maintained upon it.

ABBOTT, C. J.—It is quite clear to me upon the evidence in this case, that the defendant contracted with the plaintiff to have possession of the farm, and to pay 200*l.* for the forty acres of growing wheat, and other specified sums for the dead stock and the machine. The bargain was un-

questionably made by and with the defendant, and apparently for himself; for when he is asked to whom the dead stock is to be valued, he says, "to *me*," and he asks the plaintiff, "Have you any objection to give *me* possession of the farm?" It is contended that whatever the original contract may have been, there is no evidence of its having been executed by the defendant, and that such an inference is strongly rebutted by the fact that another person obtained possession of the farm. If that argument were strictly correct, it would, perhaps, be difficult for us to say that the possession of *George Mayfield* was the possession of the defendant, but there is further evidence on this point, because it was proved that shortly before the trial the defendant admitted that he had paid 75*l*., in part of the amount due for the wheat and the dead stock. That shews, I think, that the defendant either took possession of the farm himself, and then transferred it to *George Mayfield*, or originally put *George Mayfield* into possession; and then it follows properly that the possession of the one was the possession of the other. Then, it is said, that this being a parol agreement, partly for the sale of an interest in land, and partly for the sale of goods, is void in part, and consequently must be void in toto. To that I should, perhaps, assent, if the contract had been entire, and made at one time and for one price, but here there were two separate contracts, made at different times and for distinct prices. The original bargain was for the forty acres of wheat at 200*l*., and though the conversation which passed at that time leads to the presumption that there had been some previous arrangement as to giving up the farm, still it does not appear what that arrangement was, or whether it contained any stipulation respecting the wheat or the dead stock; all that appeared was that after the bargain had been made for the wheat at 200*l*., an appraiser proceeded to value the dead stock, and having done so, and asked to whom it was to be valued, was answered by the defendant who said, "let it be valued to me." That is the only

1824.

MAYFIELD v. WADSLEY.

evidence of the contract for the dead stock, and, therefore, the plaintiff is clearly entitled to recover the price of the dead stock as for goods sold and delivered to the defendant. Then as the defendant paid 75*l.* on account of the transaction generally, without directing its application to the one contract or to the other, the plaintiff is by law at liberty to apply it to any just demand which he had against him. He might apply it, therefore, to the demand which he had in respect of the wheat, and may still contend that he has a subsisting claim in respect of the dead stock and the machine; and in that view of the case the plaintiff is entitled to a verdict at all events, and the most that the defendant can claim is to have the damages reduced accordingly. But if the Court see clearly that there is no ground for entering a nonsuit, they must consider deliberately whether there is good ground for reducing the damages. Even if the plaintiff cannot recover the rest of his demand upon a declaration for growing crops bargained and sold, founded upon the original contract, because that contract is void by the statute of frauds; still I apprehend he might recover upon a declaration averring that the defendant was indebted to him for the value of crops sown by him upon land in his possession, which the defendant was permitted by him to take away, and for which he promised to pay. Then if according to the strict letter of the law the plaintiff is entitled to a verdict for part of the damages upon this declaration, and would be entitled to a verdict for the rest upon a different declaration, I think we ought not to reduce the damages, because the justice of the case is satisfied by the present verdict, and it would only be increasing the expenses of the parties, without altering the legal result. For these reasons I am of opinion that this rule ought to be discharged generally.

BAYLEY, J.—In point of fact the defendant made this bargain on account of *George Mayfield*, and then in construction of law *George Mayfield* was the defendant, his

1824.

MAYFIELD *v.* WADSLEY.

possession was the possession of the defendant, and his performance would be the performance of the defendant. It was left to the jury to decide whether the defendant did agree to pay for the wheat for *George Mayfield*, and they have found that he did. It is argued that there is no evidence to warrant that finding, but I think there was very strong evidence of such an agreement, and certainly sufficient to be left to the consideration of the jury. Look at the conversation between the parties. The plaintiff asks the defendant if *he* will take the wheat at 200*l.*, adding, that unless he will do so, he shall not have the farm. The defendant agrees to take the wheat, and when the dead stock is valued, and it is asked to whom it shall be valued, he says, "value it to *me*;" he then inquires of the plaintiff, "Have you any objection to give *me* possession of the farm?" and subsequently promises to pay for the wheat and the dead stock on a particular day. Eventually he does pay 75*l.* on account of the wheat and the dead stock, and a short time before the trial he acknowledges that he has done so; it is plain, therefore, that he contracted on account of *George Mayfield*, for if he had not received possession both of the farm and the dead stock, he would not have paid the money, or, having paid it, would have demanded it back. Then as there was a delivery of possession pursuant to the contract, and to the satisfaction of the defendant, there is certainly no ground for a nonsuit, because as to the 44*l.*, the price of the dead stock, the statute of frauds does not apply, and the plaintiff is entitled to a verdict. The 75*l.* having been paid generally on account, cannot now be appropriated to the dead stock by the defendant, but it may be appropriated to the wheat by the plaintiff, and then there remains a debt owing on account of the dead stock. As to the residue of the demand for the wheat, I am inclined to think it may be recovered in this form of action. The defendant bargained for it specifically as crops, and he received them, either personally or by the means of *George Mayfield*, as crops. Under

such circumstances, I am inclined to think that the statute of frauds does not apply, and that the plaintiff is entitled to retain his verdict for the whole amount of the damages.

HOLROYD, J.—Under the circumstances of this case, I incline to think that the verdict may be supported for the whole amount. There is, in my opinion, ample evidence to shew that the defendant executed the contract, and that the possession of the farm was delivered to him, or to *George Mayfield* by his authority. Then, unless the statute of frauds applies to the whole contract, the plaintiff is entitled to recover for his whole demand. Crops growing upon the land have in some instances been considered as goods and chattels; and where an incoming tenant agrees to take the crops of an outgoing tenant, the value of them may be recovered under a count for goods bargained and sold. I think the crops in this case were chattels, and that the sale of them was not a sale of an interest in the land within the statute. It is said that the conversation at the time of the valuation shews that it was the intention of the parties to bargain for an interest in the land. The plaintiff did indeed say, that unless the defendant would take the wheat, he should not have the farm, but I think that amounted to no more than a conditional agreement, that if the defendant took the farm, he should take the crops also. The farm might have been taken by an agreement with the lessor, but if that had been so, and another action had been brought against the defendant for not taking the farm, the conditional agreement for the crops would not have been void by the statute of frauds. There was no evidence of an engagement that the outgoing tenant should assign his interest in the farm to the defendant. Indeed that interest ceased at *Lady-day*, when the possession was to be given up, therefore he had in fact no interest to assign, and the contract could not be for the sale of any interest in land, but was for the sale of the crops, as chattels, only. I agree therefore that the

1824.

MAYFIELD v. WADSLEY.

rule for entering a nonsuit must be discharged, and that there is no ground for reducing the damages which the jury have given.

LITTLEDALE, J.—I am satisfied that, upon the evidence in this case, the defendant and *George Mayfield* must be considered as one and the same person, and that the transaction must be viewed in the same light as if the defendant had made and executed the contract for his own benefit. The verdict therefore is clearly good for the amount of the dead stock and the machine, because even if the agreement for the wheat was a contract for the sale of an interest in the land, and void within the statute, still as the dead stock was sold for a separate price, an action would lie for the value of that, as that part of the agreement was not vitiated by the defect in the other. With respect to the other point, I entertain great doubts whether this, or any other kind of action can be maintained for growing crops. Considering the language of the fourth section of the statute of frauds, it does seem to me that this was a contract for the sale of an interest in land, because if the giving up the land was part of the consideration for the defendants taking the wheat growing on it, the wheat must be regarded as part of the land. There may be a contract for growing crops exclusive of the land; but where the land is sold as well as the crops, it becomes a contract for the land. I do not think it follows that because the wheat was valued at a distinct price, it was the subject of a distinct contract, and most of the cases in which this point arose were those of contracts for growing crops wholly independent of the land, and where no assignment or letting of the land was contemplated. What precise interest the plaintiff had in the land does not distinctly appear, but it seems plain that he had some which would continue after Lady-day, and which he intended to assign to the defendant. The language used in conversation in my mind shews that the plaintiff had the power to assign or to

1824.
MAYFIELD v. WADSLEY.

withhold assigning the farm, and then I think the sale of the wheat became a sale of the farm. Growing crops may be sold under a writ of fieri facias, but if they are transferred with the land, they must be taken as part of the land, although they are separately valued. Here the wheat was valued separately, but was not sold separately from the farm. If the plaintiff had been the owner of the farm, and the letting had been by parol, from year to year, this action perhaps would have been maintainable; because then the contract for the wheat would have been subsidiary only to another parol contract, legal and binding in itself, and not within the purview of the statute. It would have been the same if there had been an under-lease granted; but I take it not to be so, where there is an assignment, for then the statute requires it to be in writing, and the contract for growing crops is subsidiary to the written contract for the land: and I collect from the case altogether that there was an assignment here. Again, a parol contract for the sale of growing crops, made between the outgoing and the incoming tenant, would be good, because there the sale of the interest in land proceeds from the landlord: but here, as it occurs to me, there was a contract for the sale of an interest in the land, and the wheat formed part of the contract, and therefore that the case is within the statute, and the action not maintainable. I am not without my doubts upon the point, and I express my present opinion with diffidence after what has fallen from my Lord Chief Justice and my learned brothers. It is however quite clear that the plaintiff is entitled in point of law to the value of the dead stock and the machine, and that, as far as the justice of the case is concerned, the defendant ought to pay him the residue of the price of the wheat.

Rule discharged.

1824.



MOORE *v.* RAWSON.

A right to light is acquired by mere user, and may be forfeited by non user, though for less than twenty years; unless an intention is manifested, when the non user commences, to resume the right within a reasonable time.

THIS was an action on the case for obstructing plaintiff's lights. Plea, not guilty, and issue thereon. At the trial before *Holroyd*, B., at the last *Lent* Assizes for *Derbyshire*, the case was this. Plaintiff was seised in fee of a messuage and building, with a yard, garden and appurtenances, situate at *Ripley* in the County of *Derby*, occupied by a yearly tenant, and adjoining on the north side to certain premises belonging to defendant. Plaintiff's messuage was an ancient building, and had formerly adjoined to some premises then used as a weaver's shop; and which old shop had ancient windows which were used by the weavers there employed. About seventeen years ago the old shop was pulled down by the then proprietor, and a stable erected on the same spot, having a blank wall, which adjoined to the premises of defendant, and which new building had of late been used as a wheelwright's shop. About three years ago, while plaintiff's premises were so used, defendant erected a building next to the blank wall, upon which plaintiff opened a window in the blank wall, precisely where there had formerly been a window in the old wall, and now brought this action for an obstruction of that window by means of the building erected by defendant. The question being whether under such circumstances the action would lie, the learned Baron directed the jury to find a verdict for the plaintiff, giving the defendant leave to move to enter a nonsuit, and *Denman*, C. S. having in *Easter* term last obtained a rule nisi accordingly,

N. R. Clarke, (with whom was *Vaughan*, Serjeant,) now shewed cause. Every man has, primâ facie, a common law right to enjoy all the light and air to which his land is accessible, therefore the only question is whether the plaintiff has by any means waived or forfeited that right. An enjoy-

ment of lights in a particular way during a space of twenty years raises the presumption of a grant by the owner of the adjoining land of the privilege so to enjoy them. Now the plaintiff, or his predecessor, has enjoyed the light in question for more than twenty years, and therefore a grant of the privilege to enjoy it must be presumed from some individual empowered to make it; and the right having once been vested in the owner of the premises cannot be devested out of him except by a release of it to the grantor, or a non-user of it by the grantee during such a period as to raise the presumption of a release. But such a presumption cannot be raised by a non-user for less than twenty years, therefore it does not arise here, because the non-user, even if it amounts to that, has lasted only seventeen years. For this there is an authority in the case of *Lethbridge* v. *Winter* (*a*). There a gate had been recently put up in a place where a similar gate had formerly stood, but where for the last twelve years there had been none. It was thereupon contended for the defendant, that from suffering the gate to be down so long and permitting the public to use the way without obstruction for so many years, the plaintiff and those under whom he claimed must be considered as having completely dedicated the way to the public, and that the gate could not be replaced. The plaintiff however had a verdict, which the Court of King's Bench refused a rule nisi to set aside. That shews that a non-user for twelve years does not work a forfeiture of a right, and therefore upon the principle of that case, it seems clear that this action is maintainable. [*Littledale*, J. Was not the act of building the blank wall an abandonment of the right to use the window?] It is submitted not, because the new window was put out within twenty years, and upon the same spot where the old one had formerly been enjoyed.

Denman, C. S. and *Reader*, contrà. The elements of light, air and water, are, primâ facie, publici juris, but an

(*a*) 1 Camp. 263.

1824. MOORE v. RAWSON.

individual may acquire an exclusive right to the enjoyment of them in a particular spot, and in a particular way, either by occupancy or by enjoyment. The period of enjoyment necessary to confer such an exclusive right, is by the *English* law fixed at twenty years, and a right acquired by such enjoyment may be forfeited by a discontinuance of it, unless the person claiming the right evinces, at the moment when he discontinues the enjoyment of it, his intention to resume it within a reasonable time. That, neither the plaintiff, nor his predecessor in these premises has done, but on the contrary, they have, by erecting and continuing a blank wall on the site of that in which the window was formerly opened, evinced their intention to discontinue the enjoyment of the light which they had previously acquired in that place. It is true that twenty years exclusive enjoyment of light has been considered sufficient to raise the presumption of a grant by the owner of the adjoining land of the liberty to exercise such enjoyment (*a*); but a right can only be transferred by an instrument adequate to the purpose, and a right to light being incident to the land itself, is an easement annexed to the land, and can only be transferred by deed. It is impossible from the facts of this case to presume any grant, whether by deed or otherwise, except indeed for a limited and specific period of time, which must be taken to have terminated when the blank wall was erected. A deed conveying that limited right is consistent with the actual enjoyment proved in this case, and no other can be presumed, for no grant can in any case be presumed, but that which is necessary to account for the enjoyment. *Barker* v. *Richardson* (*b*). There lights had been enjoyed for more than twenty years, contiguous to land, which within that period had been glebe land, but was conveyed to a purchaser under the 55 *Geo.* 3. c. 147; and it was held that no action would lie against such purchaser for building so as to obstruct the lights, inasmuch as the rector, who

(*a*) See *Cross* v. *Lewis*, ante, vol. iv. 234.
(*b*) 4 B. and A. 579.

1824.

Moore v. Rawson.

was tenant for life, could not grant the easement, and therefore no valid grant could be presumed. Upon this authority, and for the reasons already stated, it is clear that this action is not maintainable, and that the rule for entering a nonsuit must be made absolute.

Abbott, C. J.—I think the rule for entering a nonsuit ought to be made absolute. Many years ago the then proprietor of the plaintiff's premises enjoyed air and light by means of a window in a wall of his house. Subsequently he pulled down that wall, and upon its site erected a blank wall, having no window. In that state the premises continued seventeen years, and in the interval the defendant erected a building opposite to the plaintiff's blank wall; and then, and not till then, the plaintiff opened a window in that very wall, and now complains of that window being darkened by the building erected by the defendant. Even assuming that the plaintiff was entitled to the first window as an ancient light, still I think that having discontinued the enjoyment of the right for so many years, it lies upon him to shew that when he apparently abandoned his right, he did not meditate a perpetual, but only a temporary abandonment, that he nevertheless possessed the right, and that he intended to resume it within a reasonable period. The onus of proving all this, in my opinion, lies upon the person who discontinues the enjoyment of the light, and the plaintiff certainly has produced no such evidence, which I think he was bound to do, because, by building the blank wall, he may have induced the defendant to believe that he had for ever abandoned the window, and have invited him to expend his money in the attainment of an object, the completion of which the plaintiff now seeks to prevent. For these reasons I am of opinion that this action is not maintainable.

Bayley, J.—I take it that the right to light, air, or water, may be acquired by enjoyment (a), and that being

(a) See *Williams* v. *Morland*, ante, vol. iv. 820.

1824. Moore v. Rawson.

once acquired it will continue so long as the party either actually continues, or manifests an intention to continue his enjoyment of it. The plaintiff's predecessor had acquired a right to the enjoyment of the light, but he thought proper to discontinue his enjoyment, and to erect a blank wall without any window in the place of that in which there formerly was a window. I am of opinion that as he then ceased to enjoy the light at the spot and in the manner which he had been used to do, his right so to enjoy ceased also; and I think such an opinion is strictly consistent with justice. Suppose the plaintiff had entirely removed the house and buildings and converted the ground into a garden, and used it as such during a space of seventeen years; and that the defendant had in consequence been induced to purchase the adjoining ground for the purposes of building on it, surely it would be most unjust to enable the plaintiff after such conduct to step in and defeat the very object for which the defendant had laid out his money. The rule to be collected from the doctrine of modern times in connection with this subject seems to me to be, that the enjoyment gives the right; and I think we shall not qualify that rule too much by holding, that the discontinuance of the enjoyment destroys the right, unless the party, at the time when he discontinues it, plainly indicates his intention to resume it afterwards within a reasonable time.

Holroyd, J.—I also agree that a nonsuit must be entered. The former owner of the plaintiff's premises was entitled to the house with the windows, but the right acquired by his enjoyment of the windows continued no longer than the existence of the house in which they were; and therefore when he had, by his own act, destroyed the house and the windows, he had also destroyed the right to the enjoyment of the windows. If, when he pulled down the house, he had expressed his intention to rebuild it, the new house would have been a continuation of the old, and the right attached to the old would have continued. If I have

a right of common, or of turbary, attached to my mill or my house, and I pull down the mill or the house, the right primâ facie ceases; but if I express my intention to rebuild the house or the mill, the right continues. Here, the building the blank wall, in my opinion, goes farther to shew that the plaintiff had no intention of continuing his enjoyment of the windows, than if he had pulled down the house, for in the latter case he might have intended to substitute something similar, but here he did substitute something quite different.

Littledale, J.—By the present rule of law a right of way, or a right of common (except common appendant) upon another man's land, may be acquired by an adverse enjoyment of twenty years, because the law then presumes a grant, made before the enjoyment began, by some person having power to make it. But if the privilege so granted is disused for a length of time, it is abandoned, for there the law presumes that the grantee has released it. It is said that as the grant can be presumed only after twenty years enjoyment, a non-user of twenty years is necessary to raise the presumption of a release; and as regards a right of way, or of common, that argument perhaps is just. But the acquisition of those rights depends on very different grounds from those of a right to light, or to air; for the latter is acquired by mere occupancy; while the former can only be acquired by user, coupled with the consent of the owner of the land: and when the user has continued twenty years, that consent is implied, together with a grant of the easement, dated before the commencement of the user. The right to light or air, as it may be acquired by mere user, so, in my opinion, it may be lost by non-user, and it would, I think, be extremely unjust and inconvenient, if a right so easily acquired could be lost only by an abandonment during twenty years. If a man pulls down his house, and converts the ground on which it stood into arable or pasture land, that is, in my opinion, a declaration that he never intends to

1824. MOORE v. RAWSON.

rebuild the house, and is consequently a complete abandonment of all the rights which he enjoyed coupled with and by means of the house. So here, I think, the plaintiff by pulling down the wall that had windows, and building up a new wall without any windows, expressed his intention never to renew his right of enjoying light and air by means of windows in the wall, and consequently abandoned and lost that right from that moment; for, the period of the abandonment appears to me quite unimportant, particularly where the party changes the nature of the thing out of which the right which he abandoned arose, as the present plaintiff has done.

Rule absolute.

STORER and others, Assignees of JAMES FLETCHER, a Bankrupt, v. W. H. HUNTER.

Where a colliery, with all the machinery and implements necessary for working it, was leased for years, with a proviso for re-entry by the landlord on non-payment of rent, and a covenant on the part of the lessee, at the expiration or *other sooner determination* of the demise, to deliver up the machinery and implements, conformably to an inventory annexed to the lease, of which a revaluation was to be made three months before the expiration of the demise, and the landlord recovered judgment in ejectment, in *Trinity* Term, for a forfeiture in not paying rent, but did not execute the writ of possession until the 8th *November*, and the tenant committed an act of bankruptcy next day:—Held, first, that the landlord was entitled to take possession of all the machinery and implements (some of which had been brought on the premises by the tenant during the term), though no previous valuation had been made; second, that the possession of the machinery and implements by the tenant was only qualified, and did not come within the meaning of 21 *J.* 1. c. 19., so as to bar the landlord's right of entry on the 8th *November*; and third, that the tenant's use of the machinery and implements in the interval between the judgment in ejectment and the execution of the writ of possession, did not give him the "possession, order or disposition" thereof, with the consent of the true owner, within the meaning of the statute, so as to pass the property to his assignees.

THIS was an action of trover for two engines and other machinery, whimsies, gins, rail-roads, box chains, gears, hoops, and other implements used in working two collieries, the property of *James Fletcher*, the bankrupt, and alleged to have been converted by the defendant since the bankruptcy. Pleas, first, not guilty; and second, the statute of limitations, and issue on both pleas. At the trial before *Hullock*, B., at the *Lent* Assizes, for *Derbyshire*, 1824, the case was this:—The plaintiffs were assignees under a com-

1824.

Storer
v.
Hunter.

mission of bankrupt awarded against *James Fletcher* on the 16th *November*, 1819, founded upon an act of bankruptcy committed on the 9th of the same month. By a lease, dated 1st *January*, 1810, the defendant demised two collieries to the bankrupt for the term of twenty-one years, and also all the engines, gins, machinery, rail-roads, and other implements, effects and things, then being in, and upon, or about the said collieries or coal-works, or used or employed therewith; and also all the boats and waggons used for the purpose of the said collieries, and other effects incident or belonging thereto, and particularly mentioned and described in an inventory and valuation thereof, taken by Mr. *James Woodhouse* in or about the month of *January*, 1810, with the usual powers to work and carry on the collieries for the term demised, rendering 10*l*. rent for every 100*l*. for which coals, slack and coke, should be sold from the said collieries during the said demised term, and to be paid quarterly. Covenant by the tenant for payment of the rent, with a proviso for re-entry in case the rent should be in arrear and unpaid by the space of 30 days after the same should become due on the days of payment respectively. The lease then contained a covenant, "that on the expiration or *other sooner determination* of the said demised term, the said *James Fletcher* should and would leave and yield up unto the said *W. H. Hunter*, his heirs, executors, administrators, and assigns, all and singular the engines, gins, machines, rail-roads, machinery, effects and things, belonging to, and used in the said collieries, or coal-works, and that an inventory and valuation should, three months previous thereto, be made and taken by two indifferent persons to be for that purpose appointed, by the said *W. H. Hunter* and *James Fletcher*, or their representatives, or by an umpire to be appointed by the two referees, in case they should differ about the same, and such inventory and valuation should thereupon be compared with the then present inventory and valuation, and in case the amount thereof should fall short of the amount of the then present valuation, which had been

1824.

STORER v. HUNTER.

made and signed by the said *J. Woodhouse*, the difference should be paid by the said *J. Fletcher* unto the said *W. H. Hunter*, his heirs, executors, &c. on demand; but in case the amount of the inventory and valuation, to be taken as aforesaid, on the expiration or other sooner determination of the demise, should exceed the amount of the then present inventory or valuation, then *W. H. Hunter*, his heirs, &c. should pay unto *J. Fletcher*, his executors, &c. the difference in value thereof, within three months from the time of such valuation being made." The bankrupt entered into possession of the collieries, engines, machinery, fixtures, and all the moveable articles used therein, and continued in possession until the 8th *November*, 1819, when the defendant was put into possession by the sheriff of *Derbyshire*, by virtue of a writ of habere facias possessionem, sued out upon a judgment recovered in *Trinity* Term, 1818, upon an ejectment brought for a forfeiture by reason of non-payment of rent. During the time *Fletcher* was in possession of the collieries he had laid out considerable sums of money in repairing the machinery, replacing implements which had been worn out, and keeping the property in the same state in which it had been demised; he had also erected a new engine. For these purposes the sum of 2000*l.* at the least, had been expended, and even after the judgment in ejectment had been obtained against him by the defendant, he had purchased a new boiler at the price of 60*l.* for one of the steam-engines. Evidence was given as to the custom in the coal districts of *Derbyshire* when coal mines are let to tenants. It was proved that in some instances the machinery and implements are purchased by the tenant, in which case the tenant, at the expiration of the tenancy, takes them away, and in others, that the machinery and implements are let with the colliery, the tenant paying a rateable proportion of rent for the use of them, and at the expiration of the term delivering them up with the colliery to the landlord. Under these circumstances it was contended that the action was maintainable on either of two grounds; first, that the

whole of the machinery and implements passed to the plaintiffs as assignees of *Fletcher*, he having had the apparent ownership during the time he was in possession under the demise; or, second, that they passed by operation of the 21 *Jac.* 1. c. 19., inasmuch as the defendant (supposing him to be the true owner) had, between the time of recovering the judgment in ejectment and the bankruptcy, suffered the bankrupt to remain in the possession, order and disposition of the property in question. It was insisted, thirdly, that at all events the plaintiffs were entitled to recover the value of the moveables, supposing they had no right to the fixtures. Contrà, it was urged that the bankrupt's lease having become forfeited by the breach of covenant in not paying the rent, the whole of the property, fixtures as well as moveables, became absolutely vested in the defendant from the time of his obtaining judgment in ejectment, and that the subsequent possession by the bankrupt was not a possession within the meaning of the statute of *James*, so as to devest the right so acquired. The learned Baron left it to the jury to say, whether, under the circumstances proved, the bankrupt could be considered as the reputed owner at the time of the bankruptcy, holding, that if he were, the plaintiffs could recover for the value of the moveable implements only. The jury, under this direction, found their verdict for the plaintiffs for the value of the moveables in possession of the bankrupt at the time of the act of bankruptcy. Liberty, however, was reserved to the plaintiffs to move to increase the damages, if they should be so advised. The learned Judge also reserved liberty to the defendant to move to enter a nonsuit, or a verdict for him if the Court should be of opinion that the whole property vested in him when the bankrupt's lease was forfeited. *Vaughan*, Serjt., obtained a rule nisi in *Easter* Term to set aside the verdict for the plaintiff, and enter a nonsuit, or enter a verdict for the defendant, as the Court should direct.

Denman and *N. R. Clarke* (with whom was *Reader*) now

1824.

STORER v. HUNTER.

shewed cause. The fixtures, machinery, and implements used in working these collieries, passed to the assignees under the operation of the statute 21 *Jac.* 1. c. 19. This was clearly a case of reputed ownership from first to last. In the first place, the bankrupt occupied the collieries from 1810 until 1818, under lease from the defendant, during which time he had complete dominion over the machinery and implements, and in fact exercised that dominion in every way in which it could be exercised. By bringing the ejectment under the proviso for re-entry for non-payment of rent, the defendant treated the bankrupt as a trespasser. That ejectment was brought in *Hilary*, 1818, and having obtained judgment in *Trinity* Term following, the defendant might have possessed himself immediately of the whole of the property; but instead of doing so, he suffered the bankrupt to continue in the possession, working both the collieries down to the 8th *November*, 1819, when the habere facias possessionem was executed. It is perfectly clear, therefore, that from the time the judgment was recovered until the 8th *November*, the bankrupt had the reputed ownership of all the machinery and moveable articles in the collieries, with the express permission of the defendant. He had never taken any steps to notify to the world that the title to the property was changed, but, on the contrary, he permitted the bankrupt to remain in possession as if nothing had happened, and thereby enabled him, by the reputed ownership, to gain a delusive credit. The case, then, comes within the very words of the statute 21 *Jac.* 1., the bankrupt having had the possession, order and disposition, with the consent of the true owner. Suppose there had never been any writ of possession executed, can there be any doubt that at the time of the act of bankruptcy this would be considered as a reputed ownership? This is not like the case of a ready-furnished house, where it may be matter of notoriety that the tenant has no property in the goods. [*Bayley*, J. May not the same observation be applied to a ready-furnished colliery, when by the usage of the country the tenant works

the colliery by means of the machinery and implements belonging to his landlord?] But here the bankrupt had not only the use of the things demised to him, but he had the power of altering and replacing them at his own pleasure, which is not the case where a party takes a ready-furnished house. Besides, here the bankrupt had the possession under a lease, and the apparent ownership would remain in him until the end of his tenancy. This is a stronger case than *Horne* v. *Baker* (a), for there the bankrupt had the vats and stills demised to him, with a power of purchasing only, whereas here the bankrupt had the power of altering the machinery, removing it from place to place, bringing new engines upon the premises, and doing every act that the real owner of the property could have done. This then is one of the very cases contemplated by the statute of *James*. The case of *Lingard* v. *Messiter* (b) is an express authority for saying, that if the bankrupt had ever the reputed ownership, it continued in him until the contrary was notified to the world by the true owner. In that case a judgment creditor had purchased, by bill of sale, from the sheriff, certain machinery seized in execution, belonging to his debtor, and after marking it with the initials of his own name, allowed the debtor to retain possession upon his agreeing to pay a rent for the use of it, and the latter having remained in possession until he committed an act of bankruptcy, it was held that inasmuch as the change of ownership was not *notorious*, the property passed to the assignees under the statute. Now, in this case there was no notoriety whatever that the reputed ownership had ceased. It is not sufficient to shew that an actual change of ownership has taken place; the party must go farther, and shew that the ownership was notoriously changed. On this ground, therefore, *Fletcher's* assignees are entitled to recover this property. The bankrupt, however, had not only the reputed, but the actual ownership of a great proportion of the fixtures and moveables.

(a) 9 East, 215.

(b) Ante, vol. ii. 495. See *Kirkley* v. *Hodgson*, Id. 848.

1824.

STORER
v.
HUNTER.

He had laid out upwards of 2000*l.* in repairing and replacing the old machinery and implements, and in purchasing new articles, and there was no evidence to shew that the new articles bought were for the purpose of replacing those which had been demised to him, or placing things in the same situation in which he had found them. It appears also that he had erected a new engine, and it was not proved that that was substituted for any other which had been on the premises at the commencement of the term. [*Bayley*, J. But by the terms of the lease the defendant was to have things of that description at a valuation.] It does not appear that the defendant was to have these things at all events. [*Bayley*, J. He clearly had a right to take possession of every thing which had been demised, and also of any other machinery or implements brought upon the premises during the term.] His right of possession could only arise at the expiration of the term by efflux of time, and not by determination of the lease in consequence of a breach of covenant. [*Bayley*, J. I apprehend that in order to bring a case within the statute of *James*, the true owner must leave the goods in the possession and visible ownership of the bankrupt up to the time of the bankruptcy, but if he resumes the possession before the act of bankruptcy, it is nothing quoad the construction of that statute, that a false credit was given to him before. In that view of this case it stands thus; that on the 8th *November* possession is taken by the defendant, and no act of bankruptcy was committed until the day afterwards. Then the visible ownership was put an end to the day before the bankruptcy.] The late cases do not seem to have carried the construction of the statute to such an extent. The mere taking of possession the day before the bankruptcy would not be such a termination of the visible ownership as would take the case out of the statute. It would look like a fraud, if by any secret arrangement the bankrupt were allowed to remain in possession up to the eve of his bankruptcy, gaining all the credit he could, and then before an act of bankruptcy was actually com-

mitted, the landlord could be permitted to come in and resume the possession. The defendant, by consenting to allow the bankrupt to remain in the possession from the time of the alleged breach of covenant until the bankruptcy, thereby enabled him to gain a false credit, and consequently the case comes within the very terms of the statute. But at all events the plaintiffs have a right to recover for the new engine, and those implements which appear not to have been substituted for any other which had been upon the premises when his tenancy commenced. The landlord would have a right of possession at the expiration of the term by efflux of time, but not when he puts an end to the tenancy by proceeding against the tenant for a forfeiture. The proviso in the lease is, that a valuation and inventory should be made three months previous to the termination of the demise, and that the difference, if any, between the valuation made at the commencement of the term and that made at the end, should be paid by the one party to the other, as the case might be. The tenant was not bound to deliver up the machinery and other things upon the premises until such valuation had been made, even if the lease had expired by efflux of time, and à fortiori he was not bound to do so, where the termination of the tenancy arose from the act of the landlord, in proceeding for a forfeiture. Here, no valuation having been made, the tenant was not bound to deliver them up, and consequently the new articles, at least, continued the property of the tenant, and having become vested in his assignees, they are entitled to recover them in this action.

ABBOTT, C. J.—I am of opinion that the rule ought to be made absolute for a nonsuit. Upon the facts stated, it appears to me, that the bankrupt never had the absolute ownership of this property, and in that respect the case differs from *Lingard* v. *Messiter* and *Kirkley* v. *Hodgson* (a), in each of which, at one period of time, the bankrupt had

(a) Ante, vol. ii. 848.

1824.

STORER v. HUNTER.

been the actual and absolute owner of the property in dispute; whereas here the bankrupt never had the absolute property, his right to it being qualified, and subject to the terms of the lease under which he held the collieries. The lease contains several covenants on the part of the bankrupt, and there is a proviso that if the rent be not paid within a certain time, the landlord may re-enter. That is followed by another proviso, namely, that at the expiration or other sooner determination of the lease, a valuation shall be made of all the fixtures, implements and things, (words sufficiently large to comprise moveable as well as irremoveable property,) and such valuation is to be made within three months beforehand. Now, if the lease was to expire otherwise than by lapse of time, it would be impossible that the provision for making a valuation thiee months beforehand could ever take effect. The effect of the proviso, as it seems to me, is, that whenever the lease expired, the landlord was to be at liberty to resume the possession not only of the collieries, but of all the machinery and implements used therein, whether fixed or moveable, he accounting for their value. If the valuation exceeded that made when the tenancy commenced, he would have to pay the difference to the tenant; but if it was less, the tenant would have to make up the difference. Considering this proviso for a valuation according to its fair import, it is impossible to suppose that it was not meant to include new articles brought on the premises during the term, as well as what had existed at the time of the demise. It stands to reason that there must have been considerable wear and tear of the old articles, and that it would be necessary to repair or replace them from time to time. The provision, therefore, for taking a new valuation and comparing it with the old one, manifestly shews that every thing was intended to be included in the valuation at the expiration of the tenancy, the landlord paying for such as had been added during the term. Indeed, the very terms of the proviso contemplate the purchase of new or additional articles by the tenant, and that they were to be included in

the valuation when the lease expired; and the schedule annexed to the lease contains an inventory, not merely of fixtures, but of moveable machinery, and other things necessary to the working of the collieries. Then, if the bankrupt never had the absolute ownership, but only a qualified right to the use of the articles during the term, what is there to shew that he had at any time the reputed ownership? The case of *Horne* v. *Baker* has been cited, but that is mainly distinguishable from the present case. There it did not appear to be usual for moveable articles, such as vats and other utensils of that kind, to be let together with the distillery. Possession of articles of that description, as far as concerns the world at large, imports that the person in possession has the real and absolute, and not the qualified property. In this instance it appears from the evidence, that in some cases the lessee of a colliery is the absolute owner of the fixtures and machinery, and in others that they belong to the landlord. The case now before us is of the latter description. It is impossible, therefore, in such a state of things to say, that the mere possession, unaccompanied by any proof of an absolute ownership, can raise an inference of a reputed ownership within the meaning of the statute of *James*. Upon that short ground it appears to me that the learned Judge should either have nonsuited the plaintiffs, or have directed the jury to find for the defendant; but I think the better course for us, is to make the rule absolute for entering a nonsuit, in order that the plaintiffs may not be precluded from bringing another action.

BAYLEY, J.—It appears to me, that as the property, leased to the bankrupt, had been in the possession of the landlord at the time the lease was granted, and was all included in the lease, there never was, from first to last, a reputed ownership in the bankrupt; and that the defendant had a right to take possession of the whole as soon as the lease had expired either by efflux of time or by forfeiture. I am also of opinion, that at the time when the act of bank-

1824.

STORER
v.
HUNTER.

ruptcy was committed, *Fletcher* had not the possession, order and disposition of the goods and chattels which are the subject of this action, within the meaning of the statute 21 *Jac.* 1. c. 19., and I likewise think that those articles which were fixed to the freehold, although they had never been the property of the landlord, but had been brought upon the premises by the tenant, could not be recovered in this action, because they are fixtures of that description which the tenant was not, according to the terms of his tenancy, entitled to remove. The statute of *James* has the words " possession, order and disposition," and with a view of determining whether a case is or is not within that statute, the general question is, whether the party has or has not the apparent ownership of the property at the time of his bankruptcy. In trying that question it is necessary to look to the character of his possession, and the place in which the possession occurs. It is perfectly clear that if a person lets a ready-furnished house, the tenant has not the possession, order and disposition, nor even the apparent ownership of the furniture, within the meaning of the statute. Why? Because if the party interested in ascertaining the fact will take the trouble of enquiring in the neighbourhood where the house is situated, he will easily ascertain upon what terms the tenant has entered, and will find that the furniture belongs to the landlord. In a case, therefore, of that description, the question of reputed ownership cannot arise. There are also many other cases in which, though the reputation of the neighbourhood may be, that the tenant is the owner of the property, yet that will not justify the conclusion, that it is a reputed ownership within the meaning of the statute. It is incumbent on the party, in such cases, to look a little further, before he can predicate that the mere possession constitutes a reputed ownership. Before he assumes that the property is actually vested in the party in possession, reference must be had to the terms on which he holds. For instance, if he holds under a lease, recourse must be had to the lease itself, in order to ascertain what property

1824.

STORER v. HUNTER.

has been demised. It is notorious, in the neighbourhood where these collieries are situated, that fixtures and implements of this nature are in some cases the property of the tenant himself, and in others are demised by the landlord, the tenant paying a certain rent for the use of them. Under such circumstances it would become material to ascertain what was the nature of the tenancy, and the terms on which the tenant held possession. If I take possession of a ready-furnished colliery, what is the presumption? The presumption is, that the fixtures, machinery, and implements, belong to the landlord, and that I enjoy the use of them only, paying the landlord a certain price for that accommodation. I use the words "ready-furnished" as applied to a colliery, because it explains the meaning of that presumption which arises from a bare possession. If I take it upon the terms of the landlord's remaining the proprietor of the furniture, it will depend upon the bargain between me and him, whether that is the true character of the transaction. If it is a doubtful question, which of us is the owner of the furniture, I take it to be the bounden duty of the persons who are called upon to give me credit, not to conclude at once, from the bare possession, that I am the true owner, but to take the trouble of ascertaining the real nature of my possession. When a man takes a house or a colliery, ready-furnished, on lease, in order to ascertain to whom the furniture belongs, a prudent person, before he gives credit upon a possession of that kind, ought to look to the terms of the lease, and ascertain whether it was a demise of a naked house or a naked colliery. If, upon taking such a step, he finds that the tenant did not take the naked colliery, but took also all the engines, gins, rail-roads, implements and other effects, necessary to carry on the coal works, mentioned in an inventory and valuation, made at the time when the demise took place, he would then give credit or not, as he thought proper. The fact of a tenant taking possession of a colliery, with the furniture, at a valuation, mentioned in an inventory, may, of itself, be considered

1824.

STORER v. HUNTER.

as notice to the neighbourhood that the furniture is not his own property; and as there must have been a valuer on the one side and on the other, there would be no difficulty in finding out the valuers, and ascertaining whether the tenant had purchased the property out and out, or was merely to be allowed the use of it, paying his landlord a compensation in the shape of rent. I cannot conceive, that in a case of this description, when the machinery and implements were notoriously the property of the defendant before the lease was granted, the mere fact of *Fletcher's* taking possession could raise a belief in the neighbourhood that he had become the proprietor of any one of the articles; and if there was not originally that presumption raised, nothing appears to have occurred since which could at all justify the supposition of ownership, or obtain for the bankrupt a delusive credit. There is nothing in the lease which makes a distinction between moveables and fixtures, so as to let in the presumption that the bankrupt might have the order and disposition, and reputed ownership of the moveables, though he might not be entitled to the fixtures. On the contrary, the lease and the inventory negative any such distinction, because they include every thing in and upon the premises, moveable and immoveable. It may be true that some other articles were introduced on the premises afterwards, but if the bulk of the property originally belonged to the landlord, and the lease demised every thing upon the premises either fixed or moveable, the presumption would be that the tenant introduced new articles, of whatever description they might be, merely for the purpose of replacing others originally there, and consequently they would stand on the same footing as those originally demised. If that were not the case, there might be a distinction between the moveables and the fixtures, but here the lease treats the machinery, implements, and every thing used in working the colliery, as fixtures, whether they were on the premises at the time of the demise or brought on afterwards. The case of *Horn* v. *Baker* is an authority to shew that with reference to fixtures they

cannot be recovered in an action unless they are such fixtures as the tenant is entitled to remove, not by the general rule of law, but according to the bargain between him and his landlord; for in all cases, the right of a tenant to remove fixtures must depend upon the bargain between the parties, in the absence of any general rule of law, or usage to the contrary. This, as it seems to me, is an answer to the argument that the tenant had the reputed ownership of such articles as were not included in the lease and inventory. But if this were not so, this case clearly does not come within the operation of the statute of *James*. In order to pass property to assignees under the operation of that statute the bankrupt must in all cases have the "possession, order, and disposition," *at the time the act of bankruptcy is committed.* Here the bankrupt had not the possession, order, and disposition at the time he became bankrupt. On the 8th *November*, the sheriff puts the defendant into possession of the coal mines, and every thing belonging to them, and on the next day the tenant commits an act of bankruptcy. By the terms of the bargain between the parties, the tenant had no right to remove any thing from the land, and upon the breach of covenant for paying the rent, the landlord had a right to re-enter and re-possess himself of every thing he had demised. On the 8th *November*, the defendant is put into the actual possession, and there is no dispute that on that day the possession was perfect and complete. Indeed from first to last there is no evidence to shew that *Fletcher*, after the writ of possession was executed, still retained any dominion or authority over any of the property. There was therefore at that time a complete determination of his right of possession in the collieries, and in every thing thereto belonging. It is true that the landlord took possession of all the articles then on the collieries, subject to the payment of any surplus value, exceeding the estimate mentioned in the inventory, but if there had been no such stipulation still the bankrupt would have had no right to remove any of the articles. The defendant having a right to possess

1824.

Storer v. Hunter.

himself of the collieries, also acquired a right to the machinery and implements with which they had been worked. Had the lease expired by efflux of time a valuation was to have been made three months previously; but here the bankrupt by his breach of covenant had rendered it impossible to make such a valuation. But in whatever way the tenancy was to have been determined, it was quite clear that the landlord was entitled to resume the possession of every thing in the collieries, subject only to the payment of any increase in the value of articles on the premises, contrasted with the inventory delivered when the premises were first demised. The stipulation for such a payment manifests the intention of the parties to have been, that whatever articles were on the premises, whether new or old, the landlord was to have the possession of the whole whenever the tenancy was terminated. For these reasons I am of opinion that as the bulk of the property in question was originally included in the lease, the bankrupt never had the visible ownership of it within the meaning of the statute, and that if he ever had the visible ownership of the articles which he himself brought upon the premises, that ownership was determined before the act of bankruptcy was committed. The case of *Horn* v. *Baker* is distinguishable from the present, because there the inquiry was whether according to the usage among distillers, the lessee had a right to the vats and utensils, and it was found by the jury, that it was not usual for the tenant to leave them upon the premises, and consequently they could not be included in what are usually called fixtures. Here the usage was both ways, and therefore it became the duty of those who were disposed to give credit to the bankrupt, to inquire into the terms of the bargain between him and his landlord. One point made by Mr. *Denman* in this case is, that the judgment in ejectment was recovered long before the period when the writ of possession was executed. I do not particularly advert to that circumstance, because I am of opinion that prior to the judgment in ejectment, the bankrupt had not the visible

ownership of the property, and therefore the recovery in ejectment only left things in statu quo. The forbearing to sue out the writ of possession does not at all vary the landlord's rights, or place the tenant in a different situation after the judgment against him had been obtained. I am of opinion that the rule must be made absolute for entering a nonsuit.

HOLROYD, J.—I am also of opinion, independently of the statute 21 *Jac.* 1. c. 19. s. 11. that the bankrupt had not such a right of property in the fixtures and implements, as to entitle his assignees to bring trover. But with reference to that statute I think likewise, that he had not the possession, order and disposition of the property, in such a way as to bring the case within its operation. This was a lease, not of the collieries only, but also of the engines, implements, and all the moveable articles which belonged to the coal works when the lease was made, and which the bankrupt was bound to deliver up at the expiration or other sooner determination of the term. It appears upon the evidence not to have been an unusual thing to make such a demise, the tenant paying the landlord a compensation for the use of his machinery and implements. Referring to the provisoes of the lease, it is quite manifest, that the possession of the bankrupt was not a possession within the meaning of the statute. But I agree with my Brother *Bayley* in thinking that the possession having been rightfully taken away from the bankrupt before he committed the act of bankruptcy, that would itself be sufficient to take the case out of the statute. From first to last the bankrupt had never any thing more than a qualified right of possession, because he was bound to deliver up to his landlord every thing upon the premises when his tenancy ceased. The possession in the interval between the judgment in ejectment and the execution of the habere facias possessionem, was virtually the possession of the land-

1824.

STORER
v.
HUNTER.

lord, who might at any moment during that time have exercised his right of actual possession. His forbearance until the 8th *November* can make no difference, because from the beginning the bankrupt never had an absolute right of possession in any part of the property.

LITTLEDALE, J.—I also agree with the rest of the Court in thinking, that the rule must be made absolute for entering a nonsuit. With respect to the fixtures in this case, they are quite out of the question, because the assignees clearly cannot claim them on the ground that the bankrupt was the reputed owner. Fixtures are not goods and chattels within the meaning of the statute 21 *Jac.* 1. c. 19. *Ryall* v. *Rolle* (*a*) and *Horn* v. *Baker*. But independently of that rule of law, as to the fixtures, it must depend upon the terms of the bargain between the parties, whether the property in the other things used in the colliery belonged to the tenant or the landlord. Now according to the terms of the lease, the machinery and implements are as much the subject of the demise as the collieries themselves. Here, therefore, is a possession which is not contemplated by the statute of *James*. Possession of moveable chattels under a lease is one which the law will recognize. If a man takes a ready furnished house on lease, the furniture demised to him does not fall within the operation of the statute of *James*; his apparent ownership may be consistent with the terms of the contract, and the law will recognize such a contract. In the case of a factor, though the possession of the merchant's goods may appear to all the world to be a possession in his own right, yet the law says that the statute of *James* shall not in such case operate to prejudice the rights of the true owner. There may be other cases in which the apparent possession of goods can be so explained, as to prevent that statute from attaching. Assuming the bankrupt

(*a*) 1 Atk. 165.

1824.

STORER v. HUNTER.

in this case to have the apparent possession of all the moveable chattels in their collieries, yet by the very terms of his lease he is bound to deliver them up in the same state in which they were demised, with a stipulation that if there are any additional things brought on the premises, he shall receive a compensation; but every thing on the premises is to be yielded up to the landlord. The stipulation as to the time when the valuation is to be made, I think could apply only where it was possible for the landlord to give the requisite notice for that purpose; but here it was impossible to give such a notice, because the bankrupt himself had forfeited his lease by his breach of the covenant to pay rent. The landlord had a right to re-enter whenever the rent was in arrear for thirty days; and it is impossible to contend that the making a valuation was a condition precedent to the landlord's right of entry, when by the act of the tenant himself his tenancy was determined. It is said that after the judgment in ejectment the bankrupt was allowed to retain the visible possession and reputed ownership, but I think that makes no difference, because the right of entry existed on the 8th *November*, by relation to the time when the judgment was recovered. But at all events the bankrupt could not in that interval be considered as having the "order and disposition" of the property, within the meaning of the statute. I am also of opinion that the statute 4 *Geo.* 2. c. 28. by which power is given to a tenant to reinstate himself in his term, within six months after execution executed, does not make any difference. Upon the whole I am of opinion that judgment of nonsuit must be entered.

Rule absolute for entering a nonsuit.

1824.



Todd and others *v.* Thomas Maxfield.

Generally speaking, the Court will relieve the bail, wherever the defendant is entitled to his discharge.

Where a defendant obtained his certificate under a commission of bankrupt before the trial, but did not plead it puis darrein continuance, the Court ordered an exoneretur to be entered on the bail-piece.

Where a defendant had been three times declared a bankrupt, and had not paid fifteen shillings in the pound under the second commission, the Court held that the third commission was not void on that account, but voidable only.

THIS was a rule for entering an exoneretur on the bail-piece, on the ground that the defendant, who was a bankrupt, had obtained his certificate. The affidavits upon which the rule was obtained disclosed these facts:—The action, which was on a bill of exchange, was tried on the 11th *January*, 1824; judgment was signed on the 19th *February*, 1824, and a writ of ca. sa. issued, returnable in fifteen days of *Easter*, to which there was a return of non est inventus; and a writ of sci. fa. then issued against the bail, returnable in five weeks of *Easter*. The defendant was declared a bankrupt under three several commissions, which issued, the first in *January*, 1808, the second in *November*, 1817, and the third in *April*, 1823, but his estate never had paid, nor was it ever likely to pay fifteen shillings in the pound, under any of them. The certificate under the third commission was granted on the 9th *December*, 1823.

Platt now shewed cause. First, the defendant might have pleaded his certificate puis darrein continuance, and where that is the case it has been expressly held that the bail shall not be relieved; *Clark* v. *Hoppe* (*a*); and second, as the bankrupt has not paid fifteen shillings in the pound under the second commission, the third commission and the certificate obtained under it are wholly void. *Martin* v. *O'Hara* (*b*).

Comyn, contrà. Where a bankrupt is clearly entitled to his discharge, the Court will relieve the bail although they have not regularly surrendered him, and although the certificate was not obtained till after the return of the writ of ca. sa. Therefore, unless the certificate is void, this bankrupt is clearly entitled to his discharge, *Tidd*, 280. 6th edition; and though *Clark* v. *Hoppe* is a decision to the contrary, it

(*a*) 3 Taunt. 46. (*b*) Cowp. 823.

1824.
Todd v. Maxfield.

is not a decision of this Court, and never has been adopted by this Court. Then, the certificate is not void; the third commission is still in existence; and though the non-payment of fifteen shillings in the pound under the second commission is good ground for applying to the Lord Chancellor to supersede the third, still, until it has been superseded, it is a valid commission, and the certificate obtained under it is not void.

Abbott, C. J.—Generally speaking, the Court will interpose to relieve the bail, whenever the bankrupt is entitled to his discharge. In this case, if the certificate was valid, the bankrupt was entitled to his discharge, and the bail consequently are entitled to relief. It does not appear that the rule laid down in *Clark* v. *Hoppe* has ever been adopted in this Court, and I do not feel inclined to adopt it for the first time on the present occasion. The certificate obtained under the third commission is valid unless the commission itself is absolutely void, and at least so long as the commission remains in force the certificate continues valid. I think the fact of the bankrupt's not having paid fifteen shillings in the pound under the second commission, does not render the third commission absolutely void; but that it is only voidable by application to the Lord Chancellor. This rule therefore must be made absolute.

The rest of the Court concurred.

Rule absolute.

Twopeny and Boys v. Young.

A. being indebted to *C.*, *A.* and *B.* gave their joint and several promissory note for the amount to *C.* *A.* becoming further indebted and pressed for further security, by a bill of sale, (reciting that *C.* having demanded payment of the debt, *A.* had requested him to accept a *further* security,) assigned his household effects to *C.* as a *further* security, with a proviso, that he should not be turned out of possession of the effects till after three days' notice:—Held, that *C's.* remedy on the note was neither suspended nor extinguished by the bill of sale, but that he might sue *A.* on the note at any time, notwithstanding the bill of sale.

ASSUMPSIT on a joint and several promissory note for 290*l.* and interest, dated 10th *March*, 1817, by defendant

1824.
TWOPENY v. YOUNG.

and one *Rummen* to plaintiffs, payable on demand. Plea, non assumpsit, and issue thereon. At the trial before *Graham*, B., at the *Kent* Summer Assizes, 1823, the case was this:—*Rummen*, who was a publican, was at the date of the note indebted to the plaintiffs, who were in partnership as distillers, to the amount of 290*l.* and being pressed for security persuaded the defendant to join in the note. The plaintiffs soon afterwards dissolved partnership, when *Boys* took upon himself the partnership debts and credits and carried on the business alone, and continued to deal with *Rummen* till the close of 1820, during which interval he received from him 676*l.* for goods supplied and for interest on the note. At the end of that year there was a balance of 380*l.* due to *Boys* for goods sold and for the note, and upon his pressing for further security, *Rummen*, on the 6th *January*, 1821, executed a bill of sale, by which (after reciting that 380*l.* was due to *Boys*, and that for 290*l.* parcel of that sum, *Rummen* and defendant had given the note, and that *Boys* having demanded payment, *Rummen* had requested him to accept such *further security* as was thereinafter mentioned,) he assigned to *Boys* as a *further security* all his household effects, &c. The bill of sale contained a stipulation that *Rummen* should retain possession of the effects during his life, subject to his possession being determined upon three days' notice at any future time, while the said sum of 380*l.* or any part thereof, remained due. *Rummen* retained possession and continued to deal with *Boys* till *March*, 1823, and in that interval paid *Boys* 500*l.* for goods supplied. In *February*, 1823, a commission of bankrupt issued against *Rummen*, founded upon an act of bankruptcy committed in *October*, 1822, and on the 4th *March*, 1823, *Boys* demanded payment of the note of the defendant. Upon these facts it was contended for the defendant, first, that the note was merged in the bill of sale, the latter being a security of a higher nature; and second, that the agreement in the bill of sale to give three days' notice, was giving time to the principal, and operated as a

1824.



TWOPENY v. YOUNG.

release of the surety. The learned Judge overruled both objections, but gave the defendant permission to move for a nonsuit, and the plaintiffs had a verdict. *Marryat*, in *Michaelmas* term last, having moved accordingly and obtained a rule nisi,

Abraham now shewed cause. First, the language of the bill of sale clearly shews that it was not accepted instead of the note, but as an additional security only; therefore it was no discharge of the note, and does not impair the plaintiffs' remedy upon it. *Drake* v. *Mitchell* (*a*). Second, the covenant not to sue till after three days' notice was no release of the defendant, and could not operate so as to restrain the right of action upon the note which was previously vested in the plaintiffs. *Dean* v. *Newhall* (*b*).

Marryat, contrà. The acceptance of the new security released the principal from the old one; and the covenant not to sue without notice was an indulgence given to the principal, and therefore released the surety also. *Drake* v. *Mitchell* is no authority for the present case, because there the new security was of a lower nature than the old one. It was held in *Davey* v. *Prendergrass* (*c*), that the original debt being on a specialty, giving time to the principal by parol would not release the surety; but it seems evident from both those cases that if the indulgence had been given by a specialty, or by any security of a higher nature than the original one, the surety would have been considered as released; and Courts of Equity have certainly carried that principle to the very fullest extent now contended for. *Boultbee* v. *Stubbs* (*d*).

BAYLEY, J.—Whether the mere act of giving time to the principal does or does not discharge the surety, it is not necessary in this case to decide, because, as it seems to me, the bill of sale did not give time to the principal. It recites

(*a*) 3 East, 251.
(*b*) 8 T. R. 168.
(*c*) 5 B. and A. 187.
(*d*) 18 Ves. 20.

1824
Twopeny v. Young.

an *existing* security and purports to be given as a *further* security, it could not therefore be intended to limit or restrain the rights or remedies which the plaintiff had previously possessed. Generally, a simple contract security is extinguished by a specialty security, if the latter gives a remedy co-extensive with that given by the former. Whether it is the same, when the remedies are not co-extensive, we are not called upon to decide, because where the instrument by its language shews that the parties intended the old security to remain in force, the mere acceptance of a new security will not extinguish it: as was recently decided in the case of *Solly* v. *Ellerman* (*a*). Here the language of the instrument does shew that it was intended only as a further security, and therefore is the same as if it had contained an express proviso to that effect; consequently it does not operate as an extinguishment of the remedy on the note, either as against the principal or the surety.

Holroyd, J.—I am of opinion that the plaintiff's ground of action against the defendant on the note was not extinguished by the bill of sale. The recital proves the intention of the parties to have been, that the note should continue a subsisting security, and I can see nothing in the deed strong enough to operate by law in destruction of that intention. The plaintiffs were entitled to sue upon the note at any time, notwithstanding the deed. There is a stipulation not to put the deed in force till after three days' notice, but there is no stipulation not to sue upon the note till after notice. The deed gives the plaintiffs no higher right of action against *Young*. *Dean* v. *Newhall* is expressly in point, and is indeed a stronger case than the present. The deed, therefore, is no discharge at all as far as respects the defendant, and affords no answer to the present action.

Littledale, J. concurred.

Rule discharged.

(*a*) 8 J. B. Moore. 2 B. and B. 38. S. C.

1824.

Young *v.* Miller.

Saturday, Nov. 6.

A cause was referred to two arbitrators, one named by each party, and to such third person as should be chosen by the other two referees, the award of any two to be binding. The arbitrators not concurring in the appointment of the third, agreed that each should name one person, and that they should then toss up for choice. The plaintiff's arbitrator having won, appointed his own nominee, and the award being made in favor of the plaintiff by these two, the Court set it aside, on the ground that this mode of appointing the third arbitrator was improper.

By a Judge's order this cause and all matters in difference between the parties were referred to two arbitrators, one named by each party, and to such third person as should be named by the other two, the award of any two to be binding. The two arbitrators named in the order, enlarged the time for making the award without nominating the third. After the enlargement, being unable to agree in the appointment of the third arbitrator, it was resolved that each should name one person, and that they should respectively toss up for the choice of the person to be fixed upon. Each having named a person, they tossed up, and the plaintiff's arbitrator having won the toss, chose the person whom he had before nominated. Those two then proceeded in the reference, and made an award in the plaintiff's favor. At the close of last term a rule nisi was obtained for setting aside the award on two grounds; first, that the third arbitrator had not been nominated before the time for making the award had been enlarged; and second, that the mode of nominating the third arbitrator was improper.

Tindal now shewed cause. As to the first objection it is groundless, because there was nothing in the order of reference, making it obligatory on the two arbitrators named, to appoint the third, before they enlarged the time for making the award. The two arbitrators had power to enlarge the time, and if they had appointed the third before the enlargement, it would have been a work of supererogation. All the parties were aware of the enlargement, and, therefore, it is now too late to make any objection on that ground. Then as to the second objection, it is answered by the case of *Neale* v. *Ledger* (a), where Lord *Ellenborough*

(a) 16 East, 51.

1824. YOUNG v. MILLER.

said, "This was not a tossing up between the two arbitrators which should nominate the third in exclusion of the other, which would have been bad according to the cases cited (*a*); but after having each of them nominated one, and each of them thinking that the nominee of the other was nearly as proper as his own, they agreed to submit their opinion to this mode of selection of one out of the two fit persons. I cannot see any objection to this. The mode of appointing twelve jurors out of all those who are returned as fit to serve is by lot." Now, here, the two persons of whom choice was to be made were named before the arbitrators tossed up, and, therefore, there was nothing irregular in the winner's appointing the person whom he had selected. It is not suggested that this mode of electing the third arbitrator was not known to the defendant and his attorney, and on that ground the objection is not to be favored. *Wells* v. *Cooke* (*b*) is distinguishable from this, because that was decided on the ground that it did not appear that the defendant or his attorney had any knowlege of the mode in which the umpire had been appointed.

Parke, contrà. On both or either of the grounds taken, the award cannot be supported. First, by the terms of the reference the third arbitrator was to be chosen in the first instance by the other two, and as the award was to be made by two out of the three, there could be no authority to enlarge the time until the third was nominated, the authority being derived from the appointment, which was in writing. Here the third arbitrator was not appointed until after the enlargement, and that is a fatal objection. Second, as the agreement to toss up was made before the nomination of the two persons of whom one was to be chosen, that distinguishes this case from *Neale* v. *Ledger,* where the parties out of whom the choice was to be made, were named before any thing was said about tossing up. Besides, in that case, the two persons proposed were considered

(*a*) 2 Vern. 485 and Sayer, 99.

(*b*) 2 Barn. and Ald. 218.

equally eligible, and that mode of selection was resorted to, as the fairest to both parties. But the case of *Wells* v. *Cooke* seems decisive in principle. There the parties named two arbitrators who were to chuse an umpire, and each arbitrator named a person to whom the other objected, and they afterwards agreed to decide by lot which should name the umpire, and thereupon the party who won named the person to whom the other had previously objected, and it was held that the award made by the umpire so chosen was bad.

ABBOTT, C. J.—I am of opinion that this rule must be made absolute. It is unnecessary to give any opinion upon the first objection, the second being fatal. Here the agreement to toss up preceded the nomination of the two persons, one of whom was to be chosen as the third arbitrator. By entering into that agreement the arbitrators named in the submission precluded themselves respectively from the opportunity of objecting to the person nominated by the other, however unfit or disqualified he might be for discharging the duties of his office. The case of *Neale* v. *Ledger* is much nearer to this than *Wells* v. *Cooke*, because in the former the two persons (both of whom were equally eligible) were named before the arbitrators tossed up, whereas in the latter the persons out of whom the umpire was to be chosen were not named before the choice was made.

BAYLEY, J.—In *Neale* v. *Ledger* Lord *Ellenborough* seemed to be of opinion that if the parties tossed up who shall nominate the third, without previously naming the persons out of whom the choice was to be made, that would be bad. This case falls within that rule, and consequently the rule must be made absolute.

HOLROYD and LITTLEDALE, J.s, concurred.

Rule absolute.

1824.

MAYNARD v. RHODES.

Monday, 8th Nov.

Where an insurance was effected on the life of *A.* for the benefit of *B.* and the Insurance Office acted upon *A.'s* own representation as to the state of his health, and it turned out that he was not an insurable life:—Held, that *B.* could not maintain an action on the policy although he was not privy to the representation.

ASSUMPSIT on a policy of insurance effected on the life of a Mr. *Lyon*, for the benefit of the plaintiff. Plea, non assumpsit. At the trial before *Abbott*, C. J. at the *Middlesex* Sittings after last *Trinity* Term, it appeared that the plaintiff having advanced a sum of money to Mr. *Lyon*, effected a policy of insurance upon the life of the latter by way of collateral security. Mr. *Lyon*, in conformity with the regulations of the Insurance Office, attended to give the usual information as to the state of his health, and in the result the policy was effected. Within a few months afterwards, Mr. *Lyon* died of a disorder of long standing, but which he had concealed from the office at the time the policy was effected, and the office having refused to pay the amount insured, the present action was brought. It was contended on the part of the plaintiff that inasmuch as the plaintiff had himself made no representation as to the state of Mr. *Lyon's* health, and as the office had acted upon the representation made by the latter, the action was maintainable. The learned Judge told the jury that if they were satisfied that the representation made by Mr. *Lyon* was not substantially true at the time the policy was effected, it must be considered as a condition incorporated in the policy, by which the plaintiff would be bound, although he himself was not privy to the falsehood of the representation. The jury under this direction found their verdict for the defendant.

Scarlett now moved for a rule nisi for a new trial on the ground of misdirection. Admitting the general principle, that if a representation respecting the subject matter of insurance turns out to be substantially false, it shall make void the policy, still if the insurance is made for the benefit of a third person, who is wholly ignorant of the state of

health of the party whose life is insured, and is in no way privy to the falsehood of the representation, he shall not be prejudiced by a breach of the condition on which the policy is effected. Here the Insurance Office was informed at the time the policy was effected, that the plaintiff was about to advance money to Mr. *Lyon*, and that the insurance was to be for the plaintiff's benefit. The office made such inquiries as they thought necessary to ascertain the state of Mr. *Lyon's* health, and having satisfied themselves that his was an insurable life, they effected the policy. In point of law, therefore, the plaintiff ought not to be prejudiced by the breach of a condition to which he was not privy.

BAYLEY, J.—I am of opinion that the direction of the Lord Chief Justice to the jury was correct in point of law. The representation made by Mr. *Lyon* as to the state of his health must be incorporated in the policy as a condition, making the instrument void or binding according as the condition should or should not be broken. It can make no difference as to the result, in point of law, whether the insurance is for the benefit of the party whose life is insured, or for the benefit of a third person. The truth of the representation is equally a condition in both cases.

HOLROYD, J.—If the jury were satisfied that the representation, though made by Mr. *Lyon* himself, was untrue, it can make no difference in the legal result whether the policy was effected for his benefit or not. It was a conditional policy, and the party for whose benefit it was effected must stand to the consequences.

LITTLEDALE, J.—I have not the slightest difficulty upon the point, and I agree with the rest of the Court in thinking that there is no ground for a new trial.

Rule refused.

Monday, 8th Nov.

Rogers *v.* Jones, Esq.

Where a magistrate committed a party to prison for an alleged offence against one statute, and afterwards drew up a conviction for a different offence from that stated in the commitment:—Held, that the conviction was no justification of the magistate in an action against him for false imprisonment. Held also that the 43 G. 3. c 141. s. 2. which deprives a plaintiff of his costs of suit against a magistrate, if the latter proves at the trial that the plaintiff was guilty of the offence imputed, only applies to cases where the conviction has been *quashed*, and, therefore, such evidence was inadmissible, it not appearing that the conviction had been quashed. *Sed quære* whether admissible in mitigation of damages.

TRESPASS for false imprisonment against a magistrate of the county of *Cardigan*. Plea, not guilty, and issue thereon. At the trial before *Park*, J. at the last *Summer* Assizes for the county of *Hereford*, in order to support the plaintiff's case, a commitment under which the imprisonment took place, signed by the defendant, was put in and read. It recited that a certain quantity of wood, the property of *T. D.* had been cut and spoiled, and taken and carried away, and that he, the said *T. D.* had just cause to suspect that the plaintiff did cut and spoil and carry away the same, and that two ashen trees were found on plaintiff's premises, and that he could not give any satisfactory account how he came by the same, and, therefore, that he, defendant, convicted plaintiff of cutting, spoiling, taking and carrying away wood, the property of *T. D.*, whereupon, he, defendant, ordered plaintiff, within the space of twenty-five days then next ensuing, to pay to the said *T. D.* eleven shillings in satisfaction of the damage done, and also ordered the plaintiff within the space of twenty-five days to pay to the overseers of the parish in which the offence was committed, for the use of the poor, the sum of 20*l.* and in default of complying with the said order, he, plaintiff, was committed for disobeying the same. Under this commitment the constable took the plaintiff into custody and carried him to the house of correction, where he was detained until he conformed to the order. This commitment was supposed to be founded on the old statute 15 *Car.* 2. c. 2. In answer to the alleged false imprisonment the defendant gave in evidence a formal conviction founded upon the statute 6 *Geo.* 3. c. 48. which stated that the plaintiff had been convicted on that statute, for that he, on, &c. did go into the wood grounds belonging to *T. D.* of, &c. and did cut, spoil, and feloniously carry away two ash trees of the said *T. D.* not having the

consent of the said *T. D.*, the owner of the said woods, nor of any other person, entrusted with the care thereof, for which offence the plaintiff was ordered to pay the penalty of 20*l.*, together with the sum of 3*l.* 6*s.* for the charges and expenses attending the said conviction, this being the first offence. It was contended that this being a regular conviction drawn up conformably to the statute, was evidence of all the facts alleged in it, and a complete justification of the defendant, for which the case of *Gray* v. *Cookson* (*a*) was cited, but the learned Judge held, that as the plaintiff had been committed upon a different statute, the formal conviction afterwards drawn up was no answer to the action. Evidence was then tendered under the authority of 43 *Geo.* 3. c. 141. to shew that the plaintiff had been in point of fact guilty of the offence imputed to him in the conviction, but this evidence was rejected by the learned Judge, and the jury under his direction found a verdict for the plaintiff damages 25*l.*

Sir *William Owen* now moved for a new trial on two grounds, first, that the formal conviction drawn up by the defendant must be taken as proof of the facts therein stated, and, therefore, was an answer to the action; and, second, that the learned Judge had improperly rejected proof that the plaintiff was guilty of the offence imputed. As to the first point, it is clearly established by several cases, that in an action against a magistrate for an act done within his jurisdiction, a subsisting conviction drawn up conformably to the statute, upon which it is founded, is to be taken as conclusive evidence of the facts stated therein, and is a complete defence to the action. *Strickland* v. *Ward* (*b*) and *Gray* v. *Cookson* (*c*). The conviction produced in this case was quite sufficient to answer any ground of action, arising from the commitment produced by the plaintiff.

(*a*) 16 East, 13. (*b*) 7 T. R. 633.

(*c*) Vide *Massey* v. *Johnson*, 12 East, 67, and *Britton* v. *Kinnaird*, 4 J. B. Moore, 50. 1 B. and B. 432. S. C.

1824.

ROGERS v. JONES.

That commitment, which was founded upon an older statute, might have been drawn up by some officious person, without the authority of the magistrate; but it would not support an action, if it appeared that the magistrate had afterwards drawn up a formal conviction upon the statute, against which the plaintiff had offended. The case of *Gray* v. *Cookson* is an express authority, that a magistrate may draw up his conviction after the party has been committed. Here the conviction produced was founded upon the 6 *Geo.* 3. c. 48., and it was laid down in the same case, that if a conviction be good upon the face of it the production and proof of it at the trial will justify the convicting magistrate under the general issue, in an action of trespass, as well in respect of such facts therein stated, as are necessary to give him jurisdiction, as upon the merits of the conviction. In this case there was nothing to shew any informality or irregularity on the face of the conviction, and, therefore, on the authorities cited it was a complete answer to the action. [*Abbott*, C. J. The question is, whether a magistrate who commits a person for a supposed offence against one statute, which turns out not to be applicable to his case, shall be at liberty to relieve himself from liability, by producing a conviction on another statute, under which he might have been committed. Here the conviction and judgment do not appear to have been grounded upon any offence stated in the commitment. The magistrate signs the commitment for an offence committed against one statute, and the conviction is drawn up for an offence against another.—*Bayley*, J. In *Gray* v. *Cookson* there was nothing to shew that the apprentice was not originally committed upon a good conviction. Here, in order to render the commitment good, it must appear that it was founded upon the same statute as the conviction, whereas the conviction proceeds upon a different statute]. But if the magistrate may draw up his conviction after the commitment, the error may be cured, and the conviction will have relation to the offence actually proved

against the party. At all events the learned Judge improperly rejected the evidence tendered to prove that the plaintiff actually committed the offence stated in the conviction. By the 43 *Geo.* 3. c. 141. it is enacted that in all actions brought against any justice, for or on account of any conviction made by him under any act of parliament, or for any act done or commanded by him, for the levying any penalty, apprehending any party, or about carrying such conviction into effect, in case such conviction shall have been quashed, the plaintiff, besides the value of the penalty which may have been levied, shall not recover any more damages than two pence, nor any costs of suit unless it shall be expressly alleged in the declaration in such action, which shall be an action on the case only, that such acts were done maliciously and without any reasonable or probable cause; and by the second section of the same statute it is enacted that the plaintiff shall not recover back the penalty levied, nor any damages or costs, if the justice proves at the trial that the plaintiff was guilty of the offence. Now the learned Judge held, that this statute applied only to those cases where the conviction *had been quashed*, but if that be the true construction it would have the effect of placing the magistrate in a better situation where his conviction was quashed, than he would be where it was perfectly regular and valid in every respect. [*Abbott*, C. J. That provision was introduced into the act of parliament for the purpose of giving a general defence to the magistrate, but inasmuch as it might happen that the conviction was quashed for form and not upon the merits, the legislature enacted that although the conviction was quashed, yet the party should only recover certain damages, unless he proved that the magistrate acted from malice, and without any reasonable or probable cause.] The argument must go the whole length of saying that whether the conviction shall or shall not have been quashed, the plaintiff can only recover two pence damages in the absence of any proof of malice. [*Bayley*, J. Your argument would

1824.

ROGERS v. JONES.

go this length, that if a man be convicted upon perfectly insufficient evidence, yet if the conviction be not quashed the magistrate would be at liberty, in answer to an action, to go into evidence for the purpose of shewing that he might have convicted him upon such evidence.] The argument must certainly go that length; but at all events this was admissible evidence in reduction of damages, because it went to shew that the defendant had acted without malice, and had reasonable and probable cause for the commitment.

ABBOTT, C. J.—I think there is no ground for disturbing this verdict. It appears to me that the conviction cannot be in any way connected with the commitment, and consequently it furnishes no defence to the action. I am also of opinion that the conviction not having been quashed, it does not come within the provisions of the 43 *Geo.* 3. c. 141. which in express terms applies to actions brought in cases where *the conviction has been quashed.* That point was expressly decided in *Gray* v. *Cookson.* The only remaining point is, whether the learned judge ought to have received evidence that the plaintiff had actually committed the offence for which the conviction was drawn up. Adverting to the amount of the damages given, they very little exceed 20*l.*, which is all that the plaintiff could have paid in pursuance of the conviction had it been good, but if the commitment was bad, it is impossible to say that the plaintiff could properly have recovered less damages than the jury had given.

BAYLEY, J.—The conviction offered in defence may be perfectly good, but the commitment not being in pursuance of the conviction there is no answer to the action. The conviction is grounded upon the 6 *Geo.* 3. c. 48., but it is difficult to say upon what statute the commitment has proceeded. After the magistrate has made out an erroneous commitment, and the party is carried to prison, he cannot

1824.
Rogers v. Jones.

afterwards correct his error, and defend himself by making out a conviction for an offence of which the party might have been guilty. If the plaintiff, in this case, had been committed for the same offence as that mentioned in the conviction, the conviction would have been a defence to the action, but it is no answer to an action for a wrongful commitment for one offence, to shew that the plaintiff has been guilty of another. There may possibly be hereafter a valid commitment upon the conviction, but with that we have nothing to do at present. The damages given in this case do not appear to have been vindictive, and as the plaintiff was entitled to recover something, supposing the evidence tendered was inadmissible, it would be mischievous to the defendant to send the case down to another trial, in order to determine whether the plaintiff ought to recover 20*l.* or 23*l.* I, therefore, think there ought to be no new trial.

Holroyd, J. and Littledale, J. concurred.

Rule refused.

Doe d. Jackson v. Wilkinson.

Monday, 8th November.

Where a cottager occupied a piece of land inclosed from the waste on the side of a turnpike road for more than thirty years, without paying rent, and at the end of that time paid six pence rent on four several occasions to the owner of the adjoining land:—Held, that this was conclusive evidence of a permissive occupation only, so as to maintain ejectment.

THIS was an ejectment for a small piece of land on the side of a turnpike road in the county of *Chester.* Plea, the general issue. At the trial before *Warren*, C. J. at the last *Chester* Assizes, the case was this:—The land in question had originally been parcel of the waste, and about thirty-three years since, the defendant inclosed, built a cottage, and laid out a garden upon it. At that period one *Trafford* was owner of the freehold of the land on each side of the road. About the year 1809, the lessor of the plaintiff purchased *Trafford's* estate, and after the defendant had held the piece of land in question without any adverse

claim, the lessor of the plaintiff in 1815 demanded of the defendant the sum of six pence by way of rent, which he paid. It was called *rent* eo nomine by the witnesses, but it did not appear that the defendant was apprised of the nature of the claim or the object for which it was demanded. This sum was paid by the defendant for three or four successive years without dispute. In 1822 notice to quit was given, but the defendant refused to give up possession, insisting that he had a right to the land. The jury asked the learned Judge, whether, supposing the lessor of the plaintiff had had title for twenty years, the subsequent payment of the six pence would establish his right to recover. The learned Judge told the jury that if they believed the witnesses as to the payment of rent the plaintiff would be entitled to a verdict. The jury under this direction found for the plaintiff.

D. F. Jones now moved for a new trial on the ground of misdirection. There being no evidence in the case that the defendant was advertised of the right in respect of which the six pence was demanded, the mere payment of it, even as rent, was not conclusive against the defendant. The learned Judge, therefore, laid it down too broadly in telling the jury that the payment of rent entitled the plaintiff to recover. There was no distinct evidence of an attornment in the character of tenant. On the contrary, the probability was, that the defendant had been coaxed into the payment of the money without being apprised of the purpose for which it was demanded, and, therefore, the learned Judge was not warranted in laying it down that the mere fact of paying rent was conclusive of the plaintiff's right to maintain the action. Payment of rent is an equivocal act, unless accompanied by other circumstances to shew that the relation of landlord and tenant exists, and ought not alone to determine the question. According to the late case of *Fenner* v. *Duplock* (*a*) it ought to

(*a*) 8 J. B. Moore. 2 Bing. 10. S. C.

have been left to the jury to say whether the defendant had paid the money in the character of tenant.

1824.

DOE v. WILKINSON.

ABBOTT, C. J.—I am of opinion that the learned Judge was right in telling the jury that the payment of rent was conclusive of the plaintiff's title to maintain the ejectment. He might also have told them that all the antecedent occupation was by permission, and considering the situation of the land in dispute such a direction would have been justified. The only question then would be, whether the jury believed the witnesses, for if they believed them they were bound in point of law to find for the plaintiff. The case was so left to the jury and I think correctly.

HOLROYD, J. (*a*)—If this had been a question between the lord of the manor and the defendant, it might have been a point for the consideration for the jury, whether the payment of rent was or was not a payment of a chief rent. But the question here was, whether the payment of rent was not an acknowledgement that the defendant's was a permissive occupation. In *Bull.* N. P. 104. it is said, "A distinction has been taken and allowed by all the judges on a case reserved by *Pengelly*, C. B. that if a cottage is built in defiance of a lord, and quiet possession has been had of it for twenty years, it is within the statute, but if it were built at first by the lord's permission, or any acknowledgement have been since made, (though it were 100 years since,) the statute will not run against the lord, for the possession of a tenant at will, for ever so many years, is no disseisin; there must be a tortious ouster, and it is not to be presumed that a country fellow should build in opposition to the lord, unless it be shewn, or conveyances are produced." Now here, the rent is paid in a manner which leaves no room to doubt that the defendant conceived the plaintiff to be entitled to receive it. It is probable that if the defendant had known that the owner of the adjoining

(*a*) *Bayley*, J. was gone to chambers.

1824.
DOE
v.
WILKINSON

land had no other means of proving that the land in question was held by permission, he would not have paid the rent, but having paid it, that is conclusive evidence that he held only by permission. It is proof that the plaintiff had a right of entry on the land, for otherwise it is hardly to be supposed that he would have made so many successive payments. I, therefore, think that the learned Judge correctly directed the jury in point of law.

LITTLEDALE, J.—If the defendant had only made one payment of six pence it might possibly be considered that he had paid it in ignorance of his right, but here are three or four successive payments of the same kind, and I think they are conclusive of an acknowdgement that he was tenant by permission so as to bind his rights.

Rule refused

Tuesday, 9th November.

TRIP v. THOMAS.

Where, in case for words, the defendant suffered judgment by default, and on the execution of the writ of inquiry the plaintiff produced no evidence, and the jury assessed the damages at 40*l*:—Held, first, that the plaintiff was not bound to produce any evidence, and second, that the jury were not bound to give nominal damages only.

THIS was an action upon the case for words spoken by the defendant, imputing subornation of perjury to the plaintiff, and in which the defendant suffered judgment to pass by default. On the execution of the writ of inquiry no evidence was offered on the part of the plaintiff, but his counsel having addressed the jury they assessed his damages at 40*l*.

Ludlow now moved to set aside the execution of the writ of inquiry, contending, first, that the jury could not be justified in awarding *any* damages to the plaintiff, without first hearing some evidence on his part, which would direct their judgment in fixing the amount; and second, that under such circumstances they could not at all events be justified in awarding more than *nominal* damages.

PER CURIAM.—We cannot interfere in a case like this

1824.
TRIP v. THOMAS.

to disturb the verdict of a jury. The defendant, wisely and properly no doubt, elected to suffer judgment by default, and by so doing admitted that he spoke the words of which the plaintiff in his declaration complained, and rendered it unnecessary, therefore, for the plaintiff to produce any evidence. As the plaintiff produced no evidence, nothing passed at the inquiry which could tend to aggravate the case, or to inflame the minds of the jury, and as they have under such circumstances awarded that which they thought the just measure of damages, it would be unjustifiable in us to presume that they were misled, or that the verdict they have found is erroneous.

Rule refused.

SHELDON v. COX.

Tuesday, 9th November.

Plaintiff agreed to exchange his horse, warranted sound, with defendant, for another horse and a sum of money. The horses were exchanged, but defendant refused to pay the money, alleging that plaintiff's horse was unsound. In assumpsit on the special agreement, with indebitatus counts for horses sold:—Held, that plaintiff might recover the money on the common count, though he failed to prove the agreement as stated in the special count.

DECLARATION in assumpsit, containing special counts, upon an agreement to pay money on exchange of horses, indebitatus counts for horses sold and delivered, and the money counts. Plea, non assumpsit, and issue threon. At the trial before *Bayley*, J. at the last Assizes for *Yorkshire*, the only facts proved were that the plaintiff had agreed to exchange his black horse, which he warranted sound, for the defendant's bay mare and forty guineas, and to receive five guineas more if the black horse suited; the exchange was accordingly made as far as respected the horses, but the defendant, contending that the black horse was unsound, refused to pay any part of the forty-five guineas. It was admitted on the part of the plaintiff that this evidence would not support the special counts, and it was argued on the part of the defendant that the plaintiff could not recover on the common counts. The learned Judge, however, being of opinion that as the only thing remaining to

1824.
SHELDON
v.
COX.

be done between the parties was the payment of the money, the plaintiff might recover on the counts for goods sold and delivered, and accordingly the jury, under his direction, found a verdict for the plaintiff for forty-five guineas.

Scarlett now moved for a rule to shew cause why a non-suit should not be entered, or a new trial had, and renewed the objection taken at nisi prius. There is no case in which it has been held that indebitatus assumpsit will lie upon such a contract as this. *Leeds* v. *Burrows* (a), which was cited at the trial, is distinguishable from the present case. That was the case of a sale of goods, which were to be valued between an outgoing and an in-coming tenant, and when the goods had been valued and delivered to the incoming tenant, it was properly held that indebitatus assumpsit would lie for goods sold and delivered; because then the special agreement was complete and the case came within the rule of law there laid down, namely, that when the terms of the special agreement have been performed, if the plaintiff, having declared on the special agreement, and also on a general indebitatus assumpsit, fail in proving the special agreement, he may resort to the general count. But here the terms of the special agreement had not been performed, and the nature of the contract not having been altered by the partial performance of it, the plaintiff was bound to declare upon the agreement, and to prove it to the letter; and not having done that, he could not resort to the common counts.

BAYLEY, J.—I thought at the trial, and I am of the same opinion now, that the plaintiff was clearly at liberty to resort to the common counts. What is the transaction here? The plaintiff delivers a horse to the defendant, for which he is to be paid partly by another horse belonging to the defendant, and partly by money. The defendant does deliver his horse, but he does not pay the money. Then

(a) 12 East, 1.

1824.

SHELDON v. COX.

why should not the plaintiff recover that money on a common count as part of the price of a horse sold and delivered to the defendant? I confess that I can see no reason either in law or equity to the contrary, and I think the present case comes completely within the principle laid down in *Leeds* v. *Burrows*.

The rest of the Court concurred.

Rule refused. (*a*)

(*a*) See the judgment of *Mansfield*, C. J. in *Cooke* v. *Munstone*. 1 N. R. 355.

Tuesday, 9th November.

BISHOP and others, Assignees of HORNBLOWER, a Bankrupt, *v.* CRAWSHAY and others.

B., a manufacturer in *Staffordshire*, makes goods to the order of *A.*, a merchant in *London*, and forwards them thither, having previously committed an act of bankruptcy. Before the shipment, but after the act of bankruptcy, *B.* draws upon *A.* a bill of exchange, exceeding in amount the price of the goods, which *A.*, being ignorant of the act of bankruptcy, accepts. The goods having got into the possession of *A.*, and *B.* being declared a bankrupt:—Held, that the property in the goods never passed to *A.*; that his acceptance of the bill was not a payment "by a debtor of the bankrupt" within the meaning of the 1 J. 1. c. 15. s. 14.; and consequently that the assignees of *B.* might maintain trover against *A.* for the goods.

TROVER for a quantity of iron hoops and bars. Plea, not guilty, and issue thereon. At the trial before *Park*, J. at the last *Stafford* Assizes, the facts of the case were these. The bankrupt was an iron founder at *Briarly Hall*, in *Staffordshire*, and the defendants were iron merchants in *London*. The defendants, on the 26th *January*, 1822, sent an order to the bankrupt to make the goods now sought to be recovered, which were made in pursuance of their order, and having been loaded on board of barges on the 8th *February*, were landed at the wharfs of the defendants in *London*, on the 25th *February*, their value being 167*l.*— The bankrupt committed an act of bankruptcy on the 5th *February*, and on the following day drew a bill upon the defendants for 400*l.* which the latter, upon faith that their order would be executed, accepted; and on the 15th *February* the commission of bankrupt issued. The defendants had frequently had dealings with the bankrupt, and had been

1824.
BISHOP v. CRAWSHAY.

in the habit of accepting bills for him previous to the arrival of the goods they had ordered. On the part of the defendants it was contended that the action could not be maintained, this being a case within the 14th section of the 1 J. 1. c. 15., which enacts, "that no debtor of the bankrupt shall be thereby endangered for the payment of his debt truly and bonâ fide to any such bankrupt before such time as he should understand or know that he was become bankrupt." The learned Judge, however, being of opinion, that the case was not within the protection given by that section, directed the jury to find their verdict for the plaintiffs, for the value of the goods, which they did accordingly.

W. E. Taunton now moved for a new trial. This case is similar to the very recent case of *Cash* v. *Young* (*a*), and must be governed by it. It was there held that "goods bonâ fide sold to and paid for by a customer, in the interval between a secret act of bankruptcy by the trader, and the suing out of a commission, are not recoverable in trover by the assignees, under the 1 J. 1. c. 15. ss. 13 and 14." It is hardly possible to find a point of distinction between the two cases, for here the defendants accepted the bill in perfect ignorance of the act of bankruptcy, and upon the faith of the delivery of the goods; and such an acceptance is in construction of law a payment. But if there is any doubt upon this point, still the defendants are entitled to a new trial, because the learned Judge should at all events have left it to the jury to decide, as a question of fact arising upon the evidence, whether the goods were or were not bought and paid for bonâ fide, and in the ordinary course of trade.

ABBOTT, C. J.—I am of opinion that the direction of the learned Judge in this case was right, and that there was no question of fact which he could with propriety leave to the jury. It appeared that the defendants had for some time past been in the habit of ordering goods of the bankrupt,

(*a*) Ante, vol. iii. 652.

and of accepting bills for him before those goods were delivered. In this particular transaction they had ordered goods of him to the value of 167*l.*; he drew upon them, not for the amount of those goods, but for a much larger sum: and they accepted his bill within a few days after the goods had been put on board the barges, and long before they reached the hands of the defendants in *London.* Then the only question is, whether the acceptance of the bill by the defendants under such circumstances, was the payment of a debt by a debtor, within the meaning of the fourteenth section of the statute of *James.* In order to bring a party within the protection of that clause, he must be a debtor to the bankrupt at the time when he makes the payment; but the defendants cannot be said to have been the debtors of this bankrupt when they accepted his bill, because the goods were not then delivered, therefore they had then contracted no debt. *Cash* v. *Young* was, in one respect at least, a very different case from this. There a doubt arose whether the payment for the goods had been made bonâ fide or for some secret and unjustifiable purpose, and therefore it was properly left to the jury as a question of fact whether the goods had been bought and paid for in the fair and ordinary course of business. The jury found that fact in favour of the defendant, and then the question of law arose, whether upon the true construction of the statute, assuming the money to have been paid bonâ fide, the words "debtor of the bankrupt" could apply to a person who became a debtor after a secret act of bankruptcy committed: and certainly the inconvenience and injustice of holding the contrary were there very forcibly pointed out in argument. If the assignees could have recovered, in that case no individual would be safe in buying and paying for goods, even in a retail shop, any where beyond the limits of the City of *London;* the defendant there could not have recovered the money from the bankrupt, and therefore would have been "endangered" without any fault of his own: and the assignees would have recovered the amount twice over,

1824.

BISHOP *v.* CRAWSHAY.

once in money and once in goods. But here the defendants were not "debtors of the bankrupt" at the time when they accepted the bill; the bankrupt had at that moment no claim upon them, and if he had not become bankrupt, he could not have sued them upon the bill as for any demand of his then in existence. Therefore, as the defendants were not debtors of the bankrupt when they accepted the bill, and as the bill was not accepted in the way of payment for these particular goods, but generally for the convenience of the bankrupt; I am clearly of opinion, that this is not a case within the protection of the statute, that there was no question of fact to leave to the jury, and that there is no ground for disturbing the verdict.

BAYLEY, J.—If there had been any proof in this case, either of a general usage of trade, or of a specific agreement between the parties, by which the defendants were bound to make advances upon the goods previous to their delivery; then perhaps it might be considered that they had acquired a property in the goods from the moment when they accepted the bill, and then the case of *Woods* v. *Russell* (*a*) might apply to the present. There the bankrupt, a ship-builder, agreed to build and equip a vessel for the defendant, and the latter agreed to pay for her by four instalments, at different dates, during the progress of the work. Three were paid, but before the fourth was due or the ship was launched, the builder became bankrupt, and in an action of trover by the assignees for the value of the ship, the Court held that as between the bankrupt and the purchaser there was such a transfer to, and general ownership in the latter, as to exclude the operation of the 21 J. 1. c. 19. s. 16., and bar the action. But here there is neither proof of any usage of trade, nor of any agreement between the parties, consequently the property in the goods remained in the bankrupt when he committed the act of bankruptcy, and then passed from him to his assignees. The acceptance of the

(*a*) Ante, vol. i. 587.

bill of exchange may have been equivalent to paying for the goods, but still the case does not fall within the statute, because the defendants clearly were not the debtors of the bankrupt, at the time when they so accepted the bill.

HOLROYD, J.—I am of opinion that the property in these goods passed to the assignees by the act of bankruptcy, and that they cannot be considered as having been paid for them by the defendants' acceptance of the bankrupt's bill. The bill was not drawn specifically for the price of the goods; and though it was undoubtedly accepted upon the faith of the future delivery of the goods, still so long as the order was in course of execution only, and not actually executed, the property in the goods did not pass to the defendants. In *Woods* v. *Russell* there was an express agreement that the money should be paid by instalments from time to time while the vessel was in progress of making, and the payments were specifically appropriated to that particular object. Here the goods were completed, but the money advanced was not appropriated to them, therefore the defendants could not have recovered them in an action of trover, if they had been delivered to any other person. Then was this a payment within the 14th section of the statute? I think clearly not. There was no debt due from the defendants to the bankrupt when they accepted the bill; it was not even certain that there ever would be any such debt; and there was no appropriation of the acceptance in payment of these particular goods; the acceptance therefore cannot be considered as a payment made by "a debtor of the bankrupt," within the meaning of the statute.

LITTLEDALE, J. concurred.

Rule refused.

1824.

Tuesday, 9th November.

BENTALL and others, Assignees of BAKER and FARNLEY, Bankrupts, and DYER, *v.* BURN.

Where goods above the value of 10*l.* lying in the *London* Docks, were sold without any written contract, and a delivery order given to the buyer, it was held, that the buyer's acceptance of the delivery order was not an actual acceptance of the goods, so as to take the case out of the statute of frauds.

THIS was an action of assumpsit for goods bargained and sold, and goods sold and delivered by the plaintiff *Dyer* and the bankrupts before their bankruptcy, and was brought to recover 13*l.* 14*s.*, the value of a hogshead of *Sicilian* wine, sold to the defendant by the bankrupts, who resided in *London*, and who were co-partners with the plaintiff *Dyer*, who resided in *Sicily*. At the trial before *Abbott*, C. J. at the *London* Adjourned Sittings after last term, the facts were these. On the 15th *February*, 1822, the bankrupts, in the name of the firm, sold the defendant a hogshead of *Sicilian* wine, which was then housed in the *London* Docks, at the price of 13*l.* 14*s.*; and at the same time gave the defendant an invoice and a delivery order, signed by the firm, but no written contract was made between the parties. On the 5th *June* they applied to the defendant for payment, who said, that he had lost the delivery order; that he had not been permitted to taste the wine, nor had it been transferred to him within the proper period; and that he had in consequence been deprived of the opportunity of reselling the wine, and therefore should decline paying for it. It was proved to be the custom of the trade to give a delivery order whenever it is intended by the buyer immediately to remove the wine, and that upon production of the delivery order at the *London* Docks, and payment of the duty, which the seller always deducts from the price, the buyer may at any time obtain possession of the wine. It was objected on the part of the defendant, that his acceptance of the delivery order was not an actual acceptance of the wine, such as is required by the statute of frauds, and consequently that there having been no written contract of sale, the action could not be maintained; and the Lord Chief Justice, holding the objection to be well founded, nonsuited the plaintiffs, with

liberty to them to move to enter a verdict in their favour for 13*l.* 14*s.*

1824.



BENTALL v. BURN.

Burnewall now moved accordingly. The acceptance of the delivery order by the defendant was substantially an acceptance of the wine itself, within the meaning and requisites of the statute, because it was in evidence that upon producing the delivery order at the *London* Docks, he might the very same hour have obtained possession of the wine. This case falls within the rule laid down by Lord *Kenyon* in *Chaplin* v. *Rogers* (*a*), where he said, "where goods are ponderous, and incapable of being handed over from one to another, there need not be an actual delivery, but it may be done by that which is tantamount, such as a delivery of the key of the warehouse, in which the goods are lodged, or by delivery of other indicia of property." Here indeed the vendor had it not in his power to deliver to the defendant the key of the warehouse in which the wine was lodged, because it was lying in the *London* Docks, but he did give him that which equally enabled him to acquire the possession of the goods, and which was equally an indicium of property, namely, the delivery order. So, in an action for not delivering a quantity of rice, it appeared that the defendant had informed the plaintiff that he had a quantity of rice to sell; there was no evidence to prove any contract made, but the plaintiff produced an order on *Bennett* and Co. to deliver to him 20 barrels of rice, which was signed by the defendant, and a witness proved that defendant had told him that he had sold 20 barrels of rice to the plaintiff at 17*s.* per cwt. The plaintiff then proved the delivery of the order for the rice to the warehouseman of *Bennett* and Co. The rice not having been taken away immediately, the defendant afterwards countermanded the delivery, in consequence of which *Bennett* and Co. refused to deliver the rice to the plaintiff, who sent for it some days after the order had been countermanded. *Eyre*, C. J. was of opinion that the order

(*a*) 1 East, 194.

for the delivery, directed to the persons in whose possession the rice was, amounted to a delivery, so as to take the case out of the statute; *Searle* v. *Keeves*(a). Both these cases seem to be in point with the present. It may be argued that as the *London* Dock Company were the agents of the seller, the goods in their possession must continue his property, until they consented to become the agents of the buyer; and that they might refuse to shift their agency: and in the case of an ordinary warehouseman the argument might be of weight. But the *London* Dock Company are certificated by the treasury, under the warehousing act, 43 *G.* 3. c. 132., which confers upon them the exclusive privilege of housing wines until the duties upon them are paid; consequently they are bound to receive the goods in the first instance, to transfer them from hand to hand when required, and to be the agents of the person to whom the goods belong for the time being. That has been decided in *Allnutt* v. *Inglis*(b). Upon these grounds it is submitted that the Court will at least grant a rule to shew cause.

ABBOTT, C. J.—It appeared upon the evidence that the defendant had not been allowed access to the wine, even for the purpose of tasting it, but if he had, he certainly never had the opportunity of obtaining the absolute possession of it. He never could have "actually accepted" the wine, "or a part thereof," until the *London* Dock Company had accepted the seller's delivery order, and by so doing consented to become the agents of the defendant as the buyer. They held it in the first instance as the seller's agents, and the property could not be changed, while they continued so to hold it. They may be bound by law to transfer their agency, when required, from the seller to the buyer of goods in their custody, and they may be liable to an action for refusing so to do; but if they did in this case improperly refuse to transfer the goods, it follows that there could not

(a) 2 Esp. 598. Selw. N. P. 771. 3d. edit. S. C.
(b) 12 East, 527.

1824.

BENTALL v. BURN.

be an actual acceptance of them by the buyer until he obtained the actual possession of them, which he never did. It has been said that the delivery order in this case was a symbol of property, and constituted an actual delivery of the goods, like the key of a warehouse, as put by Lord *Kenyon*; but, as it appears to me, they are mainly different; for the key at once gives the holder the actual access to and possession of the goods, whereas the delivery order was wholly useless, until it was accepted by persons who might by possibility refuse to accept it. I am, therefore, of opinion that the nonsuit in this case was right.

HOLROYD (*a*) and LITTLEDALE, J.s, concurred.

Rule refused.

(*a*) *Bayley*, J. was absent.

FORD *v.* PRIMROSE.

Tuesday, 9th November.

The words, "I think the present business ought to have the most rigid inquiry, for he (the plaintiff) murdered his first wife; that is, he administered, improperly, medicines to her for a certain complaint, which was the cause of her death," are actionable, and if doubtful, the doubt is cured by the verdict.

SLANDER. The declaration alleged that the defendant, intending it to be believed that the plaintiff had been guilty of murder or manslaughter, in a colloquium of and concerning the death of plaintiff's wife, used these words;—" I think the present business ought to have the most rigid inquiry, for he (meaning the plaintiff) murdered his first wife, that is, he administered, improperly, medicines to her for a certain complaint, which was the cause of her death." On not guilty, the jury, at the last Assizes for the county of *Suffolk*, before *Gazelee*, J., found a verdict for the plaintiff, damages 20*l*.

Storks now moved to arrest the judgment, for that these words, taken together, were not actionable, inasmuch as they did not import any crime punishable by law. The

1824.

FORD v. PRIMROSE.

word, "murdered," is fully explained by what follows, which shews that the death was caused by the administration of improper medicines for a certain complaint, whereof the woman died. Now, if medicines were improperly administered, either from accident or ignorance, and death ensued, it would be neither murder nor manslaughter. The words declared upon, therefore, do not import any offence in law, and consequently are not actionable.

ABBOTT, C. J.—Admitting it to be doubtful whether these words import the charge of a crime upon the plaintiff, that doubt has been removed by the verdict; for the declaration alleges that the defendant uttered these words with an intention to cause it to be believed that the plaintiff was guilty of murder or manslaughter, and if the jury were of opinion that they were uttered with that intention, we cannot say that the plaintiff is not entitled to a verdict. But I cannot say that these words may not, in reasonable construction, import a charge of murder or manslaughter, especially after the finding of the jury.

BAYLEY, J.—I take it that if a man, by the improper administration of medicines to another, cause his death, that would be manslaughter. And if he administers medicines with an intent to produce death, it would be murder. I think the words declared upon, import, at least, a charge of manslaughter.

HOLROYD, J. and LITTLEDALE, J. were of the same opinion.

Rule refused (*a*).

(*a*) Vide *Thompson* v. *Bernard*, 1 Camp. 48, and *Minors* v. *Leeford*, Cro. Jac. 114.



1824.

Tuesday, November 9.

A tender of 2*l.* to pay 1*l.* 13*s.* is good, if the plaintiff objects to receive it only because he is entitled to a larger sum, and not on the ground that he has no change.

CADMAN *v.* LUBBOCK.

ASSUMPSIT for goods sold and delivered, to which the defendant pleaded, first, non assumpsit, and second, a tender of a sum of 1*l.* 13*s.*, on which issue was joined. At the last *Essex* Assizes, before *Graham*, B. it was proved that the defendant, before action brought, tendered 2*l.* to the plaintiff, and demanded the change. The plaintiff refused to take the money, saying that more than 1*l.* 13*s.* was due to him. Upon this evidence the learned Judge directed a verdict for the defendant, holding that the plea of tender was sufficiently proved.

Knox now moved for a new trial, contending that a tender of 2*l.* in payment of 1*l.* 13*s.* could not support the defendant's plea, for that he ought to have tendered the exact sum. The plaintiff was not bound to give change when a larger sum was offered. He cited *Thomas* v. *Evans* (*a*), *Botterbee* v. *Davis* (*b*), *Robinson* v. *Cooke* (*c*), and *Brady* v. *Jones* (*d*).

ABBOTT, C. J.—I think, on the authority of decided cases, the direction of the learned Judge was perfectly right, and that this was a good tender. Here the money was produced, and although it amounted to more than was intended to be paid, yet the plaintiff does not make any objection on that ground, nor does he say "I cannot give you change—You must produce me 1*l.* 13*s.*;" but he puts his refusal to take the money upon a perfectly different ground, namely, that the sum he claimed was more than 1*l.* 13*s.*

BAYLEY, J.—This is not like a case where the party does not produce any money at all; but the objection here is, as to the quantum of money tendered. In *Black* v. *Smith* (*e*)

(*a*) 10 East, 101.
(*b*) 3 Camp. 70.
(*c*) 6 Taunt. 136.
(*d*) Ante, vol. ii. 305.
(*e*) Peake, N. P. C. 88. Vide *Douglas* v. *Patrick*, 3 T. R. 683; *Wright* v. *Reed*, Id. 534; *Cole* v. *Blake*, Peake, N. P. C. 179; *Spybey* v. *Hide*, 1 Camp. 181; *Wade's* case, 5 Rep. 115, a.; *Astley* v. *Reynolds*, Stra. 916; *Muffatt* v. *Parsons*, 1 Marsh, 55.

1824.

CADMAN v. LUBBOCK.

Lord *Kenyon* said, "I take it to be clear beyond a doubt that if the debtor tenders a larger sum of money than is due, and asks change, this will be a good tender if the creditor does not object to it on that account, but only demands a larger sum." In that case there was evidence that the party had the money ready. So here, the money was produced, and the plaintiff does not object that he has no change, but he puts his refusal to take the money upon a totally different ground. I think this was a good tender.

HOLROYD, J. and LITTLEDALE, J. were of the same opinion.

Rule refused.

Wednesday, November 10.

SKAIFE and CARIS *v.* JACKSON.

A receipt is not an estoppel; it is only primâ facie evidence that the money has been paid, and is open to explanation. Therefore where, in assumpsit by two co-trustees, for money had and received to their use, the defendant produced the receipt of one of them for the money:—Held, that the plaintiffs were not estopped from giving evidence to shew that the money had not been paid, and that the receipt had been obtained by fraud.

ASSUMPSIT for money had and received. Plea, non assumpsit, and issue thereon. At the trial before *Bayley*, J. at the last Assizes for *Yorkshire*, the case was this:—The plaintiffs were co-trustees, and the defendant had received, on their account, a sum of money belonging to them in that character. In answer to the action the defendant produced a receipt for the money, signed by the plaintiff, *Caris*, only. The plaintiffs, in reply, proposed to shew that the giving of that receipt was a fraudulent transaction, and that the money had, in fact, never reached their hands. This was objected to on the part of the defendant, and it was contended that the receipt of one of the plaintiffs was conclusive upon both, and estopped them from disputing its validity. The learned Judge overruled the objection, and admitted the evidence, and the plaintiffs obtained a verdict on the merits, the defendant having leave to move to enter a nonsuit.

Brougham now moved accordingly. The evidence objected to at the trial ought not to have been received. If there was real ground for saying that the receipt was fic-

1824.

SKAIFE v. JACKSON.

titious, or fraudulently obtained, that might have justified the plaintiffs in applying to the equitable jurisdiction of the Court, before the trial, to prevent the receipt being set up as a defence; but at the trial it was not competent for the plaintiffs to produce evidence of fraud in answer to their own receipt. There can be no doubt that if *Caris* had sued alone, the receipt would have been a complete defence to the action, because a party cannot set up his own fraud in favour of himself; *Alner* v. *George* (*a*): and in the subsequent case of *Henderson* v. *Wild* (*b*), it seems to have been held that a receipt by one of two co-plaintiffs was binding upon both, where both were jointly interested in the transaction to which the receipt had reference.

ABBOTT, C. J.—I think we ought not to grant any rule in this case. The receipt was not a discharge of the action, nor could it have been pleaded in bar; but a release stands upon different grounds, and even where it is fraudulent, can be avoided only by an application to the equitable jurisdiction of the Court. A receipt is open to explanation: it is not an estoppel; it is no more than primâ facie evidence that the money expressed upon the face of it has been paid. It has been argued that a party cannot set up his own fraud; but it should be remembered that the maxim of law, "nemo allegans turpitudinem suam audiendus est," is much more peculiarly applicable to the defendant than to the plaintiffs in this case. Admitting the fraud, it would be extremely unjust to allow the misconduct of one of two plaintiffs, who are necessarily joined in the suit, to prejudice the honest claim of the other. It is not denied that the money was in fact never paid over, and therefore we should not be justified in suffering such a receipt to operate as a defence to this action.

LITTLEDALE, J. (*c*).—I entirely agree with my Lord

(*a*) 1 Camp. 392. (*b*) 2 Id. 561.

(*c*) *Holroyd*, J. was in the Bail Court.

1824.

SKAIFE *v.* JACKSON.

Chief Justice. The receipt was clearly not an estoppel, but was open to proof of the circumstances under which it was obtained: it was, in effect, no more than a verbal acknowledgment of payment. But, in addition to the argument that the receipt was an estoppel, it has been argued that it was given for the purpose of defrauding the cestui que trust, and it is said, "in pari delicto potior est conditio possidentis." But the argument fails, because these plaintiffs were not in pari delicto; one of them was not in delicto at all, and against his interests therefore, at all events, the defendant cannot be permitted to set up his own fraud. If *Caris* had sued alone, and the fraud had been brought home to him, the case would have stood on a very different footing.

Rule refused.

SYKES *v.* SYKES and another.

Thursday, November 11.

Where plaintiff marked his goods "*Sykes.* Patent.", to shew that they were his own manufacture; and defendant copied the mark on *his* goods, to shew that they were plaintiff's manufacture, and sold the goods so marked as and for plaintiff's manufacture:—Held, that case would lie for the injury, though plaintiff and defendants were both named "*Sykes*," and neither of them in fact had a valid patent. The declaration alleged, that defendants sold the goods as and for goods manufactured by plaintiff; the evidence was, that the persons to whom defendant sold them knew that they were not manufactured by plaintiff, but that defendants copied plaintiff's mark, and sold the goods so marked, in order that the purchasers might re-sell them as and for goods manufactured by plaintiff, and which they did:—Held, not a fatal variance.

DECLARATION in case, for infringing a patent, stated, that plaintiff before and at the time, &c. carried on business as a shot-belt and powder-flask manufacturer, and made and sold for profit great numbers of shot-belts and powder-flasks, which he was used and accustomed to mark with the words "*Sykes.* Patent.", to shew that the same were manufactured by plaintiff, and to distinguish them from similar articles manufactured by others; that plaintiff enjoyed great reputation with the public and others, by means of the excellence of the said shot-belts and powder-flasks, and made great gains by the sale thereof, but that defendants, knowing, &c. and contriving, &c. wrongfully, knowingly, and fraudulently, against the will and without the license of plaintiff, made great numbers of shot-belts and powder-flasks, and

marked or caused the same to be marked with the words "*Sykes*. Patent.", in imitation of the mark so made by plaintiff in that behalf as aforesaid, and in order to shew that the same were manufactured by plaintiff; and knowingly, wrongfully, and deceitfully, sold for their own lucre and gain the said shot-belts and powder-flasks, so made and marked as aforesaid, *as and for* shot-belts and powder-flasks manufactured by plaintiff; whereby plaintiff was hindered from selling great numbers of shot-belts and powder-flasks, and was greatly injured in reputation, the shot-belts and powder-flasks so manufactured and sold by defendants, being greatly inferior to those manufactured by plaintiff, &c. Plea, not guilty, and issue thereon. At the trial before *Bayley*, J. at the last *York* Assizes, the facts proved in evidence were these:—The father of the plaintiff had some years ago obtained a patent for the manufacture of shot-belts and powder-flasks, but upon an action brought by him for the infringement of that patent, it was held to be invalid in consequence of an inaccuracy in the specification. The patentee, however, and after him the plaintiff, continued to mark their articles, as before, with the words "*Sykes*. Patent.", for the purpose of pointing them out as being of their own manufacture. A short time ago the defendants set up in the same line of business, making articles of the same sort, but of an inferior quality and price, which they sold to retail dealers, having first marked them with a stamp which was a facsimile of the mark used by the plaintiff. This was done in order that the retail dealers might sell the articles again, which they actually did, as and for goods manufactured by the plaintiff, though they themselves, and the persons who so purchased of them, knew that the goods were in fact made by the defendants. In consequence of this proceeding the plaintiff's business had considerably fallen off. For the defendants two objections were taken: first, that as one of the defendants was named *Sykes*, he had a right to stamp his own name upon his own goods, and had an equal right with the plaintiff to add the word

1824.

SYKES
v.
SYKES.

1824.
SYKES v. SYKES.

"Patent" after his name, neither of them in fact having any valid patent: and second, that there was a fatal variance between the declaration and the evidence, the former alleging that the defendants sold the articles as and for articles manufactured by the plaintiff, and the latter shewing that the persons to whom they sold them well knew that they were manufactured by the defendants. The learned Judge overruled both objections;—the first, because the defendants had no right to mark their goods *as and for* goods manufactured by the plaintiff, which the declaration alleged, and the evidence proved them to have done; and the second, because it was, in his opinion, a question to be left to the jury, whether the defendants had used the mark for the purpose of representing their goods as the manufacture of the plaintiff. The case, therefore, went to the jury upon the whole of the facts, and they found a verdict for the plaintiff.

Brougham now moved for a rule to shew cause why a new trial should not be had, and relied upon the second objection taken at nisi prius. The allegation upon the record was, that the defendants sold the goods as and for goods manufactured by the plaintiff; but the evidence was that the persons to whom they sold, knew the goods to be manufactured by the defendants. That was a clear and fatal variance. The allegation should have been that the defendants sold the goods to *A.*, *B.* and *C.*, in order that they might re-sell them as and for goods manufactured by the plaintiff, and then, perhaps, the declaration might have been supported by the fact.

ABBOTT, C. J.—I think the averment in this declaration, to which the present objection is taken, was substantially proved by the facts in the case. It is perfectly clear that the defendants stamped the articles of their own manufacture with the mark "*Sykes.* Patent." for the purpose of representing them as the manufacture of the plaintiff; and though they did not in their own persons sell the goods as

1824.



SYKES *v.* SYKES.

and for goods manufactured by the plaintiff, still they did sell them to third persons in order that they might re-sell them as goods manufactured by the plaintiff, and those third persons did in fact so re-sell them. In my opinion that was in substance and effect a selling by the defendants of their own goods as and for goods made by the plaintiff, and therefore that the declaration was supported by the evidence, and the verdict ought not to be disturbed.

The rest of the Court concurred.

Rule refused.

DYSON *v.* WOOD.

Friday, November 12.

Trespass for breaking and entering plaintiff's dwelling-house, and seizing and carrying away his goods. Plea, a justification under a judgment recovered in a court baron, and a precept issued thereon. Replication, that there is not any memorandum of the proceedings, or of the said supposed judgment, remaining in the said court baron, in the said plea mentioned:— Held, *Littledale*, J. dubitante, that the replication tendered an immaterial issue, and was therefore bad on general demurrer.

DECLARATION in trespass, for breaking and entering plaintiff's dwelling-house, and seizing and carrying away his goods. Plea, as to the breaking and entering the dwelling-house, that our lord the now king, before, &c. was, and still is, seised in right of his duchy of *Lancaster*, of the liberty and franchise of the honour of *Pontefract*, in the county of *York*, with the appurtenances; and that from time immemorial until the time of the passing of the 17 *Geo.* 3. c. 15., a court baron had been used to be holden, in and for the said honour, for the suitors of the court, for the recovery of debts and damages not exceeding forty shillings, arising within the said honour, and after the passing of that act, for the recovery of debts and damages not exceeding five pounds, arising within the said honour; that defendant before, &c. recovered a judgment in the said court for 1*l.* 9*s.* 11*d.*, and prosecuted and sued out upon the said judgment, according to the custom of the said court, a precept directed to the chief bailiff and his deputies, commanding them to levy the said sum so awarded, &c.; concluding with a justification of the breaking and entering the dwelling-house for the purpose of levying the goods, under the pre-

1824.

DYSON v. WOOD.

cept. Replication, that there is not any memorandum of the proceedings, or of the said supposed judgment, remaining in the said court baron, in the said plea mentioned. General demurrer, and joinder in demurrer.

Milner, in support of the demurrer. The fact put in issue by this replication is immaterial, and therefore furnishes ground for a general demurrer. A court baron is not a court of record; therefore a judgment obtained there can be entitled to no greater weight than a foreign judgment, which it has been repeatedly decided is not a record: *Walker* v. *Witter* (*a*), *Galbraith* v. *Neville* (*b*). Suppose the defendant had taken issue upon the replication, and had brought into this Court the memorandum of the proceedings in the court baron, it could not have been read; such a document would not have been evidence, and the steward of the court baron must have been called as a witness to prove the proceedings. The only mode by which the proceedings in a court baron can be reviewed, and its judgment corrected, is a writ of false judgment; and when such a writ issues, the proceedings themselves are not removed into the court above, but the writ is directed to the steward, and he certifies the proceedings. The jury in a court baron have no power to act but by custom, nor can the court itself decide except by custom, for by common right all pleas in that court must be decided by wager of law, 2 *Inst.* 143.; and that must be inferred to have been the course here, for no custom to the contrary is alleged or found. The steward's memorandum is no evidence of itself; he may, for his own personal convenience, take a note of the proceedings, but that does not constitute the judgment of the court, nor operate as an authentic record of it. An issue, therefore, tendered upon the fact whether there is, or is not, remaining in the court baron any such memorandum or note, is a perfectly immaterial issue, and the replication tendering such issue must consequently be held bad on general demurrer.

(*a*) 1 Doug. 1.

(*b*) Id. 5.

1824.

DYSON v. WOOD.

Blackburn, contrà. The fundamental question in this case is, whether a court baron ought, or ought not, to keep some memorandum, in the nature of a record, of their proceedings; because if it is their duty so to do, then this replication tenders a material issue, and cannot, at least, be questioned by a general demurrer. Now it does appear essential that such a memorandum should be kept, because a writ of false judgment, being in the nature of a writ of error from an inferior court, as was resolved in *Jentleman's* case (*a*), must be perfectly inoperative, unless some such memorandum could be produced; for, in the absence of such a document, the superior court would have nothing by which to guide their judgment, unless the judge and the suitors in the court below were to appear before them in person, which would be a most inconvenient and anomalous proceeding. [*Bayley*, J. Suppose the proceedings had been removed after the suing out of a fi. fa. upon the judgment, then the replication would have been true; but the replication does not state that there was no memorandum remaining in the court baron at the time when the fi. fa. issued, but only that there is none remaining now; that may be true, and yet the proceedings may have been removed.] The statute 17 *Geo.* 3. c. 15. s. 28., provides that the proceedings of this court shall not be removed at all; besides, if they had been removed before the fi. fa. issued, the defendant should have rejoined, and taken issue upon the replication. The objection here is that the traverse is immaterial, and there are authorities shewing that such an objection can only be raised by a special demurrer: *Hawe* v. *Planner* (*b*), and the cases there cited.

ABBOTT, C. J.—This replication is calculated to put in issue a fact so perfectly immaterial, that even if a verdict had been found for the plaintiff upon that issue, he could not have obtained judgment; and therefore I am of opinion that it is bad upon general demurrer. The plea states that

(*a*) 6 Rep. 11. (*b*) 1 Saund. 14, note 2.

there has existed, from time immemorial, within the honour of *Pontefract*, a court baron, the jurisdiction of which was at first limited by custom to sums not exceeding forty shillings, but was afterwards, by the 17 *Geo.* 3. c. 15. s. 27., extended to sums not exceeding five pounds. I cannot, however, find that any of the provisions of that statute at all affect or change the original nature or constitution of the court; it does not, at any rate, make it a court of record, and therefore we must treat it, as it is, as a court not of record. I do not think it necessary to the present question to inquire whether it is, or is not, the duty of the steward to make a memorandum of the proceedings of the court; but assuming that it is, and that he has neglected to perform that duty, still I cannot say that the judgment of the court has been rendered wholly unavailing. Construing the replication in the very largest sense that its words can bear, it asserts no more than this, that there is not now in existence, and never was made, any memorandum of the proceedings or judgment. Supposing that to be strictly true, the steward may be guilty of a misdemeanour in thus neglecting his duty, but his neglect of duty cannot operate to deprive an innocent party of the benefit of his judgment. The question whether judgment was given for that party, in such a court, is a matter of fact for the decision of a jury, and the production of the steward's memorandum would only increase the facility with which he could prove the affirmation of that question. But on a plea of judgment recovered in a court of record, the allegation is, that there is not remaining in the court below the record of any such judgment, importing therefore that no such judgment ever was given; and there the question, whether such a judgment has, or has not, been given, is to be decided by the court above, upon inspection of the record, and not by a jury. But the fact that a judgment has been given may be proved by evidence, and by other evidence than the steward's written memorandum; consequently, this replication does not go the length of denying that any judgment was given in the court baron, but merely

1824.

DYSON v. WOOD.

asserts that the existence of such judgment cannot be proved by the memorandum of the proceedings. Upon these grounds I am of opinion that the replication in this case is insufficient, and that the defendant is entitled to judgment on demurrer.

BAYLEY, J.—I am also of opinion that this replication is bad. The plea states that the defendant obtained judgment in the court baron, and sued out execution thereon. The proper question arising upon that plea is, whether the defendant did obtain such a judgment; and the plaintiff might have denied that fact, and taken issue upon it; but instead of that he only says that there is no memorandum of the judgment remaining in the court: he does not even say that it was not remaining there at the time when execution was sued out. Perhaps that may have been properly ground of special demurrer, and of special demurrer only, because whether the memorandum was remaining at the time when the replication was pleaded, was a perfectly immaterial fact. But it seems to me that the replication is bad in substance, because, this not being a court of record, it does not appear that it was the duty of the steward to make, or keep, memoranda of the proceedings of the court; and even if that had appeared, the only result would be that the steward would be liable to punishment for neglecting his duty; not that the suitor of the court should be prejudiced by his neglect. The argument that the memorandum would be necessary for the purpose of suing out a writ of false judgment at one time produced some impression on my mind; but, upon reference to the statute, that impression has been removed, because whatever obligation may have previously existed of making such memorandum, appears to be removed by the provisions of that statute.

HOLROYD, J.—I think this replication is bad in law, and upon general demurrer. The allegation of the plea,

1824.

DYSON v. WOOD.

that the defendant obtained a judgment in the court baron, puts in issue a fact which was triable by a jury; because the fact is alleged without a verification, and without a prout patet by the memorandum. The plaintiff, in his replication, does not deny that fact, either in express terms, or by necessary implication; he has therefore admitted it. The result then is, that the plaintiff admits that a judgment was obtained, but denies that there is any existing memorandum of it. That cannot go to invalidate the judgment itself, nor is it an answer to the plea, because it only denies the existence of one particular species of evidence of the judgment having been obtained.

LITTLEDALE, J.—I am inclined to think that the present objection could not properly be raised except on special demurrer. The plaintiff might have replied generally de injuriâ suâ, though he certainly was not bound to take that course; he was at liberty to put any particular fact in issue, but my doubt is whether he has put any fact properly in issue. It seems to me that the replication does in substance deny that any judgment was obtained. Undoubtedly the usual mode of proceeding in a court baron is by wager of law, but still I think it is the duty of the steward to make an entry of the fact that the defendant did come in and wage his law. If that was his duty, then we must intend that he did so, and then the allegation that no such entry is remaining, may fairly be construed as meaning that no judgment was obtained. On special demurrer, however, this replication would clearly be bad, and therefore I am not disposed to say that the defendant is not, upon the whole, entitled to judgment.

Judgment for the defendant.

1824.



WARNE *v.* BRYANT.

Friday, *12th Nov.*

The clause in an order of reference authorising the arbitrator to examine the parties to the suit, on oath, if he thinks fit, empowers him to examine the plaintiff to a point upon which no other evidence can be adduced on the same side.

ASSUMPSIT by a builder for work and labour, and materials found. By an order of nisi prius the cause and all matters in difference between the parties were referred to an arbitrator, (not a professional man,) with power to him to examine the parties to the suit on oath, if he should think fit. The plaintiff having proved a primâ facie case by evidence of measure and value, the defendant in answer called several witnesses, who proved a verbal agreement between the plaintiff and defendant, by which the former agreed to find the materials, and do the work at prime cost, with a profit of 10*l.* per cent only upon the whole business when done. There being no evidence to negative the existence of such an agreement, the plaintiff's attorney proposed to call the plaintiff himself, who was alone cognisant of the fact. The defendant's attorney insisted that the plaintiff could not be a witness to prove his own case, but the arbitrator was of opinion that under the clause in the order of nisi prius above mentioned, he had authority to examine the plaintiff, which he did accordingly, and ultimately made an award in the plaintiff's favour, exceeding by 40*l.* the amount which he would be entitled to recover under the agreement set up by the defendant.

Denman, C. S. now moved for a rule nisi to set aside the award, on the ground, that the arbitrator had exceeded his authority, in examining the plaintiff in support of his own case, upon a point which went to the very gist of the case for the defendant. The power in the order of nisi prius authorising the arbitrator to examine the parties, was in the common and ordinary form, but this must be understood as authorising the arbitrator to examine the parties, only where there is no other evidence to enable him to arrive at the justice of the case. Here the defendant proved the

1824.

WARNE *v.* BRYANT.

agreement by indifferent witnesses, and the plaintiff alone was examined by way of reply, which is contrary to all principle. Undoubtedly there is no case to be found in which this point has been expressly decided.

ABBOTT, C. J.—We think the words of the rule of reference are sufficiently comprehensive to give the arbitrator power to examine either of the parties, in any stage of the inquiry, so as to enable him to arrive at a just and satisfactory conclusion upon the matters in dispute. The object of introducing such a clause is, that the arbitrator may not be fettered in his inquiry, by the same rules by which the judge and jury at nisi prius would be bound. It is matter of discretion with the arbitrator whether he will or will not examine the parties themselves, and it is very fit that such a discretion should be vested in such a tribunal, where the object is to come at the real merits of a case, without those restraints which must govern the proceedings of a Court of Law. We should be nullifying the clause in question, if we were to hold in defiance of its terms, that the plaintiff was not a competent witness in support of his own case; and as no authority is cited to the contrary, I think we cannot say that the arbitrator has exceeded his authority.

BAYLEY, J. and HOLROYD, J. (*a*) concurred.

Rule refused.

(*a*) *Littledale*, J. was absent.

Monday, 15th Nov.

RAYER *v.* COOKE.

In process of outlawry the third proclamation must be made in the parish in which the defendant is dwelling at the time the writ of proclamation issues; if made otherwise it is a nullity, but the Court will only set aside the outlawry on the terms of the defendant putting in bail to pay the condemnation money, unless it appears that the process of the Court has been abused, or the proclamation has been made in a different parish in order to prevent the defendant having knowledge of the proceeding.

COLERIDGE on a former day obtained a rule calling on the plaintiff to shew cause why the outlawry in this case,

should not be reversed upon the defendant's putting in bail in the alternative. On shewing cause against the rule this day, the facts disclosed by the affidavits on both sides were these:—The action in which the defendant was outlawed, was brought upon a bond dated about twelve years previously. The bond described the defendant as of *Worthamdale Farm*, in the parish of *Lifton*, in the county of *Devon*. Shortly after the bond was executed, the defendant sold *Worthamdale Farm* to the plaintiff, but continued in possession as his tenant, and paid rent for about three years afterwards. He then removed from the parish of *Lifton* to the parish of *Georgeham*, in the same county, but about fifty miles from the former parish, and resided principally there for about seven years. The defendant was the owner of several houses in the borough of *Southwark*, and he occasionally came up to *London* to look after his property. It was stated in the affidavits in answer to the motion, that the defendant had resorted to several contrivances to avoid service of process both in *London* and *Middlesex* in other suits, and had also secreted himself in his dwelling house in *Georgeham*, to avoid service of process in this action; that the sheriff of *Devonshire* had about the same time executed a writ of fieri facias on his goods and effects in the same parish, and that in the opinion of the deponents, *Georgeham* was not the defendant's last place of permanent residence, though they did not know what his last permanent residence in the county was. It appeared that the last proclamation under the process of outlawry was made at the church door, in the parish of *Lifton*, of which place the defendant was described in the bond, and the writ. Under these circumstance the question was whether as the outlawry was not conformable to the provision of the statute 31 *Eliz.* c. 3. it ought to be set aside, upon the defendant's putting in bail in the alternative, or giving bail for the condemnation money.

Marryat and *Tindal* shewed cause against the rule. The

1824.

RAYER v. COOKE.

objection to the outlawry is that the third proclamation was not made at the place prescribed by the statute of *Elizabeth,* namely, at or near the most usual door of the church or chapel of the town or parish where the defendant was dwelling at the time of the exigent being awarded. If that be so, then the only question is whether the defendant must put in bail in the alternative, or give bail to satisfy the condemnation money. Now according to the case of *Taylor* v. *Waters* (*a*) the omission to make the last proclamation at the usual place of the defendant's residence, renders the outlawry a nullity, and therefore under the 3d section (*b*) of the statute, it can only be reversed on the condition of the defendant putting in bail to satisfy the condemnation money.

Coleridge in support of the rule. According to decided cases, the Court upon the facts here disclosed can only require the defendant to put in bail in the alternative. There is no doubt that the outlawry is irregular, because the last proclamation was made at a wrong place, which renders it as objectionable as if it had been made at a wrong time; but if it is only an irregularity, the Court have a discretionary power under 6 *Hen.* 8. c. 4. of requiring bail in the alternative only. In *Waters* v. *Taylor* the Court only required that the defendant should give bail in the alternative, and this was on the ground that the making of the proclamation at the wrong time was merely an irregularity, for if there had been no proclamation at all, the recognizance of bail ought to have been taken to satisfy the condemnation money. There is, however, no pretence here for requiring the de-

(*a*) Ante, vol. iii. 575. See *Volet* v. *Waters.* Id. 55.

(*b*) Which enacts "that before the reversing of any outlawry, through or by want of any proclamation to be had or made according to the form of this act, the defendant in the original action shall put in bail not only to appear and answer to the plaintiff in the former suit, in a new action to be commenced by the said plaintiff for the cause mentioned in the first action, but also to satisfy the condemnation, if the plaintiff shall begin his suit before the end of two terms next after the avoiding of the outlawry."

1824.
Rayer v. Cooke.

fendant to give bail for the condemnation money, because there has been in fact an abuse of the process of the Court, by making the last proclamation at a place distant fifty miles from the parish where the defendant resided. It lies upon the plaintiff to shew that he has used due diligence to find the defendant, and there is no doubt that if proper diligence had been used in this case the defendant's residence might have been found, and the proclamations properly made. In *Hely* v. *Hewson*(a) the Court reversed the outlawry on motion, on the ground that the defendant was a prisoner pending the writ of exigent, and that decision proceeded according to what is stated in *Beauchamp* v. *Tomkins*(b), on the ground that the process of the Court had been abused, and the defendant, being in the country, might have been found if due diligence had been used. The case of *Hesse* v. *Wood*(c) is an authority in support of the motion in the terms prayed in this case. There the outlawry was reversed on the ground that the defendant was beyond seas at the time the outlawry took place, and therefore the Court required the recognizance to be taken in the alternative only. In principle, that case is not distinguishable from this, and as the plaintiff has not used due diligence to find out the defendant's place of abode, the Court will not require bail to satisfy the condemnation money.

Abbott, C. J.—It appears to me that this case is perfectly distinguishable from those which have been cited on the part of the defendant. In those cases there was no objection that the proclamations, such as are required by the statute of *Elizabeth*, had not been in fact made, but the objection was that they were made irregularly and at an improper time. In the present case the objection is that the third proclamation required by the statute, was made in the county and in the parish of which the defendant was described to be in the writ, and of which he described himself at the time of the execution of the bond, but not in that parish

(a) Barnes, 321. (b) 3 Taunt. 143. (c) 4 Taunt. 691.

1824.
Rayer v. Cooke.

where he resided at the time when the outlawry took place. Now prior to the statute of *Elizabeth*, this would undoubtedly have been a good outlawry; but that statute requires "that in every action personal, wherein any writ of exigent shall be awarded out of any Court, a writ of proclamation shall be awarded and made out of the same Court, having day of teste and return, as the said writ of exigent shall have, directed and delivered of record to the sheriff of the county where the defendant at the time of the exigent so awarded shall be dwelling, which writ of proclamation shall contain the effect of the same action; and that the sheriff of the county unto whom any such writ of proclamation shall be delivered, shall make three proclamations, one in the open county court, another at the general quarter sessions of the peace, in those parts where the defendant at the time of the exigent awarded shall be dwelling, and the third, one month at the least before the quinto exactus, by virtue of the said writ of exigent, *at or near the most usual door of the church or chapel of that town or parish where the defendant shall be so dwelling*." In this case, the sheriff, instead of proclaiming the defendant in the parish in which he was living at the time, proclaimed him in the parish of which he originally described himself in the bond which he executed, and certainly if the case stopped there, the proclamation would not be in conformity with the letter of the statute of *Elizabeth*, and the outlawry would be reversed for want of proclamation; but still the question is whether the defendant is entitled to have the outlawry set aside unless he either gives bail for the condemnation money or surrenders himself. If it had appeared that the plaintiff or his attorney, or any other person, had wilfully made the last proclamation in a different parish, in order to prevent the defendant from having knowledge of the proceeding, I incline to think, according to one of the cases, the Court would allow the defendant to put in bail in another form. But I confess I can see nothing in this case, which ought to lead us to the conclusion that this was done with any improper

object or with a design to prejudice the defendant. It appears that the defendant has been living sometimes in one parish and sometimes in another, and it was extremely difficult to find out where he was at the time the third proclamation was made. That being so, I see no ground to justify us in setting aside this outlawry, except on the terms of putting in bail to pay the condemnation money according to the statute.

HOLROYD, J. (*a*).—I am of the same opinion. The statute of *Elizabeth* does not give the Court the power of exercising any discretion with respect to cases which fall within its operation, and we can only set aside the outlawry upon those terms which the statute requires, namely, by requiring the defendant to put in bail to pay the condemnation money. It seems to me that the third proclamation in this case, not being made in the parish where the defendant actually resided at the time, it comes within the terms of the statute, and must be considered as if no proclamation had been made at all. It also appears to me, that there is no ground for imputing to the plaintiff or his attorney any abuse of the process of the Court, and consequently we should not be warranted in exercising a discretion in favour of the defendant, even supposing us to have such discretion.

LITTLEDALE, J.—In *Taylor* v. *Waters* the Court exercised the discretionary power given by the 6 *Hen.* 8. c. 4. in favour of the defendant, on the ground that the want of due proclamation was only an irregularity. But here the outlawry must be reversed, on the ground that the proclamation was absolutely a nullity, the proclamation not having been made according to the provisions of the statute of *Elizabeth*, and therefore, we are bound to order bail to be taken to pay the condemnation money. The ground of complaint here is not an irregularity, so as to give the Court

(*a*) *Bayley*, J. was gone to chambers.

1824. RAYER v. COOKE.

a discretionary power, but the objection goes to the whole proceeding, and the case is to be considered as if no proclamation had been made at all.

Rule absolute but without costs, defendant undertaking to put in bail to answer the condemnation money.

Tuesday, November 16.

The KING v. The JUSTICES of SURREY.

By the 26 *G.* 2. c. 31. s. 4. no ale license shall be granted but on the 1st *September* yearly, or within twenty days after, and by s. 16. alehouses in cities and towns corporate are excepted; but by 3 *G.* 4. c. 77. s. 7: all general annual meetings for granting licenses, as well in cities and towns corporate as in all other places in *England*, shall be held in the month of *September*, yearly:—Held, that the effect of this clause was not to repeal the general provision of the former statute, but to extend its operation to cities and towns corporate only.

Mandamus will not lie to the Justices to re-hear an application for an ale license at any other period of the year than within the first twenty days of *September*, though the Justices may have refused a license under a mistake of the law.

SCARLETT moved for a rule to shew cause why a mandamus should not issue to the Justices of the eastern half hundred of *Brixton*, in the county of *Surrey*, commanding them to re-hear an application for an ale license, to one *Barton*, for a public house, within their jurisdiction, it being suggested that the magistrates had refused the applicant a license for the house in question under a misapprehension of the law. The only difficulty was, whether the Justices had jurisdiction to grant the license at any period of the year except at the annual meeting in the month of *September*. By the 26 *Geo.* 2. c. 31. s. 4. it is enacted that "no license shall be granted but on the *first* of *September*, yearly, or within *twenty days* after, and that such license shall be made for one year only, to commence on the 29th day of *September*," and by s. 16. there is an exemption of cities and towns corporate as to the time of granting licenses. The 3 *Geo.* 4. c. 77. s. 7. repeals the exemption in favour of cities and towns corporate, and enacts "that from and after the passing of this act, all general annual meetings of the justices or magistrates for the purpose of granting licenses to sell ale, beer, and other exciseable liquors, by retail, as well in cities and towns corporate, as in all other places within that part of the United Kingdom called *England*, shall be held in the

month of *September* in each and every year, any local custom or usage to the contrary thereof in any wise notwithstanding." Now, as this statute was passed for the purpose of introducing new regulations as to the manner of licensing ale-houses, the 7th section ought to receive a liberal construction. [*Bayley*, J. Have the Justices any power to grant licenses except in the month of *September?*] They are directed by the 7th section to meet in that month, but there is nothing in the late statute which makes it imperative upon them not to grant a license at any other period of the year. It is submitted that the late statute leaves it open to the Justices to grant a license at any time in the year, except in cities and towns corporate, and if so, then it is competent to the Justices to hear an application for a license, though the first twenty days of *September* may have elapsed. It is obvious that by the last statute the Justices have the whole month of *September* to grant the license, which is a material alteration of the provision in the 26 *Geo.* 2., which limits the time within the first twenty days of the month.

PER CURIAM.—We are clearly of opinion that the Justices have no power to grant a license at any other period of the year than during the month of *September*. The 4th section of the 26 *Geo.* 2. c. 31. is not repealed by the 3 *Geo.* 4. c. 77. s. 7. By the 16th section of the first mentioned statute there was an exception as to cities and towns corporate. The object of the 7th section of the 3 *Geo.* 4. c. 77. is to extend the general provision of the 26 *Geo.* 2. so as to apply to cities and towns corporate. Whether the operation of section 7 of 3 *Geo.* 4. c. 77. is to extend the time of granting licenses in cities and towns corporate up to the 30th *September*, is a point not necessary to decide, but it is quite obvious that that section cannot be construed to alter the provision in the 26 *Geo.* 2. c. 31. s. 4. as to the time within which the license shall be granted, unless the two clauses are contradictory, which they certainly are not; and therefore the general provision in the 26 *Geo.* 2. remains in

1824.

The King v. The Justices of Surrey.

force, and consequently the Justices have no jurisdiction to grant a license but on the 1st day of *September*, yearly, or within twenty days after.

Rule refused (*a*).

(*a*) Vide *Rex* v. *The Justices of Farringdon Without*, ante, vol. iv. 735.

Wednesday, 17th Nov.

The King *v.* The Inhabitants of Lampeter.

A suspended order of removal must be served within a reasonable time. Therefore, where an order of removal was made and suspended on the same day, on account of the age and infirmity of the pauper; and she survived three years, but no notice of the order of removal was served on the parish to which she was ordered to be removed, till after her death:—Held, that the service was not within a reasonable time, and that the order of removal was void.

TWO Justices made their order, dated 14th *May*, 1821, for the removal of *Gwen Rees*, widow, from the parish of *Lampeter* to the parish of *Llanfairclydoge*, both in the county of *Cardigan*; but on the same day suspended the execution of the order, on account of the age and infirmity of the pauper, which in their opinion rendered it unsafe for her to travel. The same Justices, on the 16th *February*, 1824, made another order, which, after reciting that the pauper was dead, and that it had been duly proved before them on oath, that an expense of 12*l.* 13*s.* 6*d.* had been occasioned by the suspension of the order of removal, directed the churchwardens and overseers of *Llanfairclydoge* to pay that sum to the churchwardens and overseers of *Lampeter*, or to such of them as should demand the same. Both these orders were served upon the appellants, for the first time, on the same 16th *February*, and the sum of 12*l.* 13*s.* 6*d.* was at the same time demanded of them; upon which they appealed against the order of removal. The appeal was heard at the last *Easter* Quarter Sessions for the county of *Cardigan*, when the Court held that the order of removal and suspension never having been served or executed in the pauper's lifetime, nor after her death until the money was demanded, the order of removal had become a nullity, and the respondents were not entitled to give any evidence in support of that order, or of the adjudication of the pauper's

settlement in the appellant parish. The order of removal was consequently quashed, subject to the opinion of this Court.

1824.
The King v. The Inhabitants of Lampeter.

W. E Taunton and *Russell*, in support of the order of Sessions. The question arising upon the facts of this case is somewhat novel in its nature, and extremely important in its consequences. The Court are now, for the first time, called upon to decide whether a parish can recover the expenses incurred by them in consequence of the suspension of an order of removal under the 35 *Geo.* 3. c. 101. s. 2., where the pauper died before removal, and where no notice of the order of removal, or of the suspension, was given, until after the pauper's death, to the parish to which she was ordered to be removed. No direct authorities are to be found upon this point, but *Rex* v. *Chagford* (*a*) seems to throw some light upon it. There, a pauper, during the suspension of an order of removal, became irremoveable in consequence of an estate descending to him, and it was held that such a case was not within the act, and that the pauper not having been removed, no order for the payment of any charges incurred during the suspension of the original order of removal could be made. *Bayley*, J., in his judgment there, seems to put the question upon the true ground, for he says, "a very long period has elapsed, during which this order remained suspended, and no notice of it was given to the opposite party. Now, if that notice had been given, (and there are no words in the act that supersede the necessity of it,) it might have enabled the other parish to have made prompt inquiry, and to have ascertained the fact relative to the settlement of the pauper. I think, therefore, that this affords an additional reason for holding that the Sessions have come to a right conclusion in this case." That observation applies to this case, for here the evidence of the pauper, which would have been so material in ascertaining where the real settlement was, has been lost, and the most

(*a*) 4 B. & A. 235.

1824.
The King v. The Inhabitants of Lampeter.

important witness in the case has been wholly excluded. Great inconvenience and injustice is produced in another point of view, because this delay has the effect of shifting the burthen of the expenses from those who ought, to those who ought not, to bear it. The inhabitants of a parish for the time being, are the proper persons to bear the expenses of maintaining its poor; but in a case like this, new inhabitants, who have come into the parish since these expenses were incurred, must necessarily be charged with a portion of them. It is enacted by the 49 *Geo.* 3. c. 124. s. 2., that in cases where the order of removal is suspended, the period for appealing against it shall be computed, not from the time when the removal is made, but from the time when the order is served; implying, therefore, that the order may be served, and indeed that the legislature intended it to be served, before it is carried into execution, that is, before the pauper dies. In *Rex* v. *St. Mary-le-Bone* (a), neither the order of removal or suspension was served until after the death of the pauper, and though it was not there held, for indeed the point did not arise, that the order of removal in consequence became a nullity, still it was held that the subsequent order to pay the expenses was a grievance, and that an appeal against it was given by the 3 *W.* & *M.* c. 11. s. 9.

R. V. Richards, contrà. This case must be governed by that of *Rex* v. *St. Mary-le-Bone*. There the order of removal was suspended; and the pauper died without any removal taking place, and without the order being served, or any notice of its existence being given. The judgment of the Court there turned upon the 3 *W.* & *M.* c. 11., and decided, that the order for payment of the expenses was a grievance, against which that statute gave an appeal. Now, if the Court there had been of opinion that the order of removal was void for want of service or notice, the case would at once have been disposed of on that ground, and no discussion would have taken place upon the other point. The

(a) 13 East, 51.

inference, therefore, is, that the proceedings towards the removal were not considered altogether as a nullity in that case, and that the service of the order of removal after the death of the pauper was deemed a good service.

Abbott, C. J.—I am of opinion that the Sessions came to the right conclusion in this case. The utmost effect of the case of *Rex* v. *St. Mary-le-Bone* is this; that the death of a pauper during the suspension of an order for his removal does not render that order a nullity; and that a subsequent order for payment of the expenses is a grievance upon the parish to which the pauper is ordered to be removed, for which an appeal will lie. No question arose in that case respecting the necessity of serving or giving notice of the order of removal, or the order for suspending it; that question arises, for the first time, in the present case. The legislature have no where fixed any precise time for the service, but it is evident from the 49 *Geo.* 3. c. 124. s. 2., that such an order *may* be served previous to a removal; therefore, if a suspended order *may* be served, and reason and justice require that it *should* be served, it certainly should be served within a reasonable time. In this case a period of three years elapsed between the issuing of the original order of removal and the death of the pauper, and during all that period no notice was given either of the original order, or of the order for its suspension. I am, therefore, of opinion that the order of removal in this case was not served within a reasonable time, and consequently that the order of Sessions, quashing that order, must be confirmed.

Bayley, J.—The judgment of this Court in *Rex* v. *St. Mary-le-Bone*, is perfectly consistent with the judgment now delivered by my Lord Chief Justice. In that case the pauper died before the next practicable sessions after the order of removal was made, therefore the parish sought to be charged had no possibility of appealing against that order

1824.

The King v. The Inhabitants of Lampeter.

during his life. By the 35 *Geo.* 3. justices were empowered to suspend the order of removal, and to direct the costs of suspension to be paid to the removing parish; and it was held in the case alluded to that an order for such costs was a grievance within the 3 *W.* and *M.* c. 11. s. 9., for which an appeal would lie. It is quite consistent with that decision, as it is also with the provisions of the 49 *Geo.* 3. c. 124., that the service of the order of removal should not be delayed for an indefinite period; and it is but just that the parish upon which it is sought to cast a burthen, should have the earliest opportunity of enquiring whether they are liable to bear that burthen or not. A delay of three years has deprived the appellant parish in this case of every such opportunity, because it has taken away from them the power of examining the most important witness, the pauper; and it has been productive of this further injustice, that it has tended to throw the expense of supporting the pauper, during that interval, upon persons who were not then inhabitants of the parish, and who, therefore, ought to be exempt from such a liability.

Littledale, J. concurred.

Order of Sessions confirmed.

Wednesday, 17th Nov.

The King v. The Churchwardens and Overseers of the Poor of Christ's Parish in York.

Where a pauper, 10 years old, went to service "for meat and clothes, *as long as he had a mind to stop*, to do what he could, and what he was bid," and he remained two years:—Held, that this was not a yearly hiring, and that a settlement was not acquired by service under it.

BY an order of two Justices, *William Herby, Jane*, his wife, and *Ann*, their child, were removed from the township of *Saint Mary Gate*, in the North Riding of the county of *York*, to *Christ's* parish, in the city of *York*; and the sessions, upon appeal, confirmed their order, subject to the opinion of this Court upon the following case:—

The father of the pauper was settled in *Christ's* parish, and the pauper lived with his parents till he was about ten years old, when he went to Mr. *Francis Peacock*, for meat and clothes, as long as he had a mind to stop. *Peacock* then lived at *Craike*, was a wood carrier, and had two farms. The pauper was to do what he could, and what he was bid. He staid rather more than two years in *Peacock's* service, in the parish of *Craike*, and was supplied with meat and clothes. The pauper's father did not hire his son to *Peacock*, and believed the bargain was only for meat and clothes. The Court being of opinion that such service in *Craike* was not sufficient to give the pauper a settlement there, confirmed the order as aforesaid.

Tindal, in support of the order of sessions. There are three several grounds upon which the Court must hold that this pauper gained no settlement in the parish of *Craike*. First, the father was no party to any contract of hiring to *Peacock*, and the pauper, being an infant, was not sui juris to make any contract for himself, such as would give *Peacock* control over him, or constitute the relation of master and servant between them. There was, therefore, no hiring, and it can only be presumed that *Peacock* took the lad into his house from motives of charity, and a service under such circumstances will not confer a settlement. *Rex* v. *Wayhill* (*a*). Secondly, the sessions have not found as a fact that there was any contract of hiring, and in the absence of that fact the Court cannot presume it; *Rex* v. *Seacroft* (*b*). Thirdly, even if there was a contract for a hiring, it was not for a year, it was only for the pauper to stop "as long as he had a mind to stop," and that is clearly insufficient to confer a settlement.

Nolan and *Alexander*, contrà. A settlement has been gained by hiring and service in *Craike*. An infant may enter into a contract without the interference of his father, if it

(*a*) Burr. S. C. 491. (*b*) 2 M. and S. 472.

1824.

The King v. Christ's, York.

be a beneficial one, which this clearly was, because the pauper, although so young, was to receive clothes and victuals in exchange for his services. *Rex* v. *Wayhill* does not govern this case, because there it was expressly found as a fact that the pauper was employed from motives of charity; here it is not so found, and there is no reason why the Court should presume the fact. The sessions are not bound to find a contract of hiring as a fact, *Rex* v. *Chertsey* (*a*) and *Rex* v. *Worfield* (*b*); and there have been instances in which it was impossible to find such a fact, and yet where the Court have held that a settlement was gained, *Rex* v. *Holy Trinity* (*c*). A contract to receive clothes and victuals in return for service is sufficient; it is not necessary that there should be an agreement for the payment of wages in money; *Rex* v. *Worfield* (*b*). This was a general hiring, which the Court will infer to have been a hiring for a year in the absence of proof to the contrary, especially when there has been a service for a year under it. Then it was a yearly hiring with a condition annexed, namely, that the pauper should be at liberty to quit the service if he chose; but that condition never having been acted on, and a year's service having been completed, the contract becomes the same as if the condition had never been inserted, and a settlement is acquired. *Rex* v. *Sidney* (*d*), *Rex* v. *New Windsor* (*e*), *Rex* v. *Atherton* (*f*), *Rex* v. *St. Ebbs* (*g*), *Rex* v. *Putney* (*h*), *Rex* v. *Northwold* (*i*), and *Rex* v. *Byker* (*k*). The mere privilege that the pauper had of quitting the service if he chose cannot affect the case, because such a privilege must always exist, and may always be implied; as was laid down by Lord *Ellenborough* in *Rex* v. *Mitcham* (*l*). There are some few cases apparently opposed to the present argument, but upon examination they will all be found to differ from the present in their circumstances. In *Rex* v. *Elstack* (*m*)

(*a*) 2 T. R. 39. (*b*) 5 T. R. 506. (*c*) Cald. 101.
(*d*) Burr. S. C. 1. (*e*) Id. 19. (*f*) Id. 203.
(*g*) Id. 289. (*h*) 2 Bott. 191. pl. 254. (*i*) Ante, vol. ii. 790.
(*k*) Ante, vol. iii. 330. (*l*) 12 East, 351. (*m*) 2 Bott. 203. pl. 264.

and *Rex* v. *Dedham* (*a*), the presumption of a yearly hiring was completely rebutted by the fact that there was an express agreement for weekly wages; and in *Rex* v. *Bradninch* (*b*) the same effect was produced, because there the pauper agreed to live with his master by the week.

Abbott, C. J.—It cannot be denied that a general hiring is by construction of law a hiring for a year, if nothing appears upon the face of the case to rebut that presumption. Here no such presumption can arise, because the pauper went "for meat and clothes, as long as he had a mind to stop," and consequently might have quitted the service any hour he chose. That completely negatives the idea of a hiring for a year, and, therefore, upon that short ground, I am clearly of opinion that no settlement was gained in *Craike*.

Bayley, J.—I am of the same opinion. There was a case of *Rex* v. *Trowbridge*, in *Easter* Term, 1816, not reported, which was almost parallel to the present, and where this Court held that a hiring "for as long time as the pauper pleased," was a hiring at will, and rebutted the presumption of a hiring for a year.

Littledale, J. (*c*) concurred.

Order of sessions confirmed.

(*a*) Burr. S. C. 653. (*b*) Id. 662.

(*c*) *Holroyd*, J. was in the Bail Court.

Morley *v.* Newman.

Wednesday, November 17.

By submission to arbitration it was agreed between *A.* and *B.*, who carried on the business of surgeons and apothecaries at *H.*, to dissolve partnership, and that all matters in difference between them, and the terms and conditions on which the co-partnership should be dissolved, should be referred to an arbitrator; and the arbitrator having determined that it should not be lawful for *B.*, during the life-time of *A.*, to carry on the profession or practice of a surgeon, &c. at *H.* or within thirteen miles thereof:—Held, that the arbitrator had not exceeded his authority.

THE parties to this cause had carried on for some time the business of surgeons and apothecaries at *Horncastle*, in

1824.
MORLEY
v.
NEWMAN.

co-partnership, but disputes having arisen between them, it was agreed that the partnership should be dissolved, and that all matters in difference, and the terms and conditions on which the co-partnership should be dissolved, should be referred to an arbitrator. It was part of the terms of submission that *Morley* should carry on the business for his own sole benefit. The arbitrator awarded, among other things, as part of the terms and conditions of the said dissolution, to him referred, that it should not be lawful for *Newman*, during the life-time of *Morley*, to carry on the profession or practice of surgeon and apothecary in *Horncastle*, or within thirteen miles thereof.

Scarlett had obtained a rule to shew cause why the award should not be set aside, on the ground that the arbitrator had exceeded the authority given him by the submission, in awarding that *Newman* should not practice within a certain distance of *Horncastle*.

Denman and *G. Marriott* on this day shewed cause, and contended that the arbitrator had full power to award in the manner complained of, under the terms of the submission.

Scarlett and *Patteson*, contrà, insisted that the arbitrator had no power to impose the term objected to.

ABBOTT, C. J.—I am of opinion that the arbitrator had power, under the general terms of the submission, to make an award in the terms in question.

BAYLEY, J.—I think the arbitrator had power to impose the condition as to *Newman's* practice, but, supposing him to have exceeded his authority, still his award can only be void as to that part; but it may be part of the terms on which the rule is to be discharged, that *Newman* shall enter into a covenant not to practice within a certain distance of *Horncastle*.

Littledale, J. (a).—Such a condition accompanying a dissolution of partnership is very usual.

Rule discharged.

(a) *Holroyd*, J. was gone to chambers.

Garrett v. Handley.

Friday, November 19.

Where one partner in a banking firm declared upon a guarantee given to him alone, for the repayment of a sum of money advanced to *A.*, and it appeared that the money was advanced out of partnership funds:—Held, that as the interest was joint, the guarantee ought to have been declared upon according to its legal effect, and that the single partners could not sue alone.

THIS was an action of assumpsit on a guarantee. The first count of the declaration stated that on 12th *February*, 1818, in consideration that plaintiff, at the request of defendant, would advance to one *Thomas Gibbons* the sum of 550*l.* to enable him to discharge immediately the sum of 550*l.* for which he had become security for one other *Thomas Gibbons*, defendant undertook and promised plaintiff that provision should be made for repaying him the said first mentioned sum of 550*l.*, under a certain arrangement then going on for the settlement of all the concerns of the said first mentioned *T. Gibbons*. The declaration then averred that plaintiff did, immediately after the making of the said promise, to wit, on the said 12th *February*, advance and pay, and cause to be advanced and paid, to the said first mentioned *T. Gibbons*, the said sum of 550*l.* for the purpose aforesaid, but that defendant, in breach of his undertaking, did not make provision for repayment thereof. There were other counts not necessary to set out with particularity. Plea, non-assumpsit, and issue thereon. At the trial before *Abbott*, C. J. at the *Middlesex* Adjourned Sittings after last *Hilary* Term, the case was this:—The plaintiff was a partner in the banking firm of Messrs. *Bodenham, Phillips* and *Garrett*, of the city of *Hereford*. In the year 1818 *Thomas Gibbons*, Esq. had contracted to purchase an estate of his cousin, Mr. *Thomas Gibbons*, but had not paid the purchase money. Mr. *T. Gibbons*, being indebted to a Mr. *Woodhouse* in a large sum of money, prevailed on his cousin, *T. Gibbons*, Esq. to join him in a warrant of attorney to

1824.
GARRETT v. HANDLEY.

Mr. *Woodhouse*, for securing the amount. In consequence of the non-payment of the money within the period stipulated, Mr. *Woodhouse* entered up judgment, and took out execution, under which the sheriff of *Herefordshire* took possession of the goods of both the *Gibbons's*. In order to discharge the execution, *T. Gibbons*, Esq. who kept a banking account with the plaintiff's house, applied to the plaintiff to advance him the money for that purpose, which he agreed to do, provided he obtained the guarantee of a third person for its repayment. The defendant, who was an attorney, and had been concerned professionally for *T. Gibbons*, Esq. was referred to upon the subject, and he gave the plaintiff the following guarantee:

"Sir, I understand from Mr. *Gibbons* that you have had the goodness to consent to advance 550*l.* to discharge immediately a like sum for which he became security for his cousin, Mr. *T. Gibbons*, upon my assurance, which I hereby give, that provision shall be made for repaying you this sum, under the arrangement now going on for the settlement of all Mr. *Gibbons's* concerns."

On the faith of this letter, *Bodenham* and Co. advanced the sum of 574*l.* to *T. Gibbons*, Esq. on the 18th *February*, by debiting him to that amount, and transferring the sum to the credit of the under sheriff of *Herefordshire*, who at that time kept a cash account with *Bodenham* and Co. It appeared that at this time *T. Gibbons*, Esq. was indebted to *Bodenham* and Co., on his banking account, in the sum of 564*l.*; and the 574*l.* advanced as above mentioned, was charged to his debit in the partnership accounts. Under these circumstances it was objected, on the part of the defendant, that the plaintiff had no right to sue alone, inasmuch as the money advanced was the property of himself and co-partners, even assuming the guarantee to have been entered into with him personally. The Lord Chief Justice yielded to the objection, and directed a nonsuit. Another objection taken at the trial was, that before the plaintiff could recover, it lay upon him to prove that the arrangement

stated in the defendant's letter to be going on for the settlement of Mr. *Gibbons'* concerns, had not taken place; but upon this point the Lord Chief Justice gave no opinion.

Copley, A. G. in *Easter* Term, obtained a rule nisi for setting aside the nonsuit, and granting a new trial.

Jervis and *Tindal* now shewed cause. First, the evidence in this case clearly did not sustain the averment in the declaration. The declaration assumes that the money advanced was the property of *Garrett* only, whereas it belonged to himself and his partners *Bodenham* and *Phillips*. There is nothing on the face of the guarantee which makes it a personal contract with the plaintiff alone. According to its legal effect, it is a guarantee to repay the money to the plaintiff and his partners, whose joint property it was; and as the plaintiff has not declared according to its legal effect, this action cannot be maintained. In point of law the interest is joint, and as the plaintiff has no several interest in the money, he cannot sue alone. Second, the onus was cast upon the plaintiff to shew that no provision had been made by the defendant to repay the money, by the arrangement spoken of in the letter, for the settlement of Mr. *Gibbons'* concerns. Non constat, but that arrangement may be still going on, and if it be, the breach assigned is not proved, and consequently, on that ground also the action cannot be sustained.

Copley, A. G. and *Campbell*, contrà. The answer to the first objection is, that where an express promise is made to one of several parties, although they may have a joint interest, that one may maintain an action in his own name, as trustee for himself and others. In the case of a policy of insurance, and in many other cases, where the promise is made in express terms with an individual underwriter, he may maintain an action in his own name, although there may be more persons connected with him in partnership or interest. Here there is no privity between the defendant

1824.

GARRETT v. HANDLEY.

and the plaintiff's partners. The plaintiff undertakes, personally, that the money shall be advanced, and he does advance it himself out of the partnership funds, but with the consent of his partners; and the promise to repay having been made to him individually and personally, he may maintain an action in his own name. The declaration avers that the plaintiff advanced the 550*l.* in consideration of the defendant's promising the plaintiff that provision should be made for repaying him. Now the letter given in evidence completely proves that averment. It may, however, be collected from this transaction that *Bodenham* and Co. had lent the money in question to the plaintiff for his own personal purposes, and that he afterwards advanced it to the defendant on his own account in furtherance of the agreement he had entered into. Then the answer to the second objection is, that it would be calling upon the plaintiff to prove a negative if the onus was cast upon him to shew that no provision had been made by the defendant for repaying the money. If any arrangement had been made for the settlement of Mr. *Gibbons'* concerns, it lay upon the defendant to shew that such arrangement had taken place. According to the defendant's letter the arrangement alluded to was an act to be done by himself, and it is upon the assurance that the plaintiff was to be repaid by means of such an arrangement, that the latter was induced to advance the money. It lay, therefore, upon the defendant to make out as matter of defence that such an arrangement had taken place.

ABBOTT, C. J.—My learned brothers agree with me in thinking that upon the first point a nonsuit ought to be entered, and therefore it is unnecessary to give any opinion upon the second. The letter itself is an engagement on the part of the defendant to be answerable to the plaintiff for an advance of money to be made by him. It is addressed to the plaintiff alone, and it takes no notice of his partners. If the plaintiff had borrowed the money of his partners, and had advanced it to *Gibbons*, all would have been right, and

1824.
GARRETT v. HANDLEY.

it would have been competent for him to have maintained the action; but the contrary appears to have been the fact. If he had borrowed the money of his partners, he would have been made debtor to them in the partnership account, but he was not. So, if he had borrowed the money of his partners, and he had lent it to *Gibbons*, the latter would have been made debtor to him alone; but *Gibbons* is made debtor, not to the plaintiff, but to the partnership, and the money advanced is brought as an item into the account which had previously existed between him and the partnership. This is abundant evidence to shew that this is not money advanced by the plaintiff individually, but by the plaintiff and his partners, out of the partnership funds. I am of opinion, therefore, that *Gibbons* being made debtor to the partnership, the evidence is not sufficient to support the declaration, and a nonsuit ought to be entered.

BAYLEY, J.—The letter, it is true, is addressed to *Garrett* personally, but it is an answer to the allegation in the declaration, which states that he was the person by whom the money was advanced, when it appears in fact that he alone did not advance the money, but that it was advanced by himself and partners in their joint capacity as bankers. If it could have been made out that the money was the sole property of the plaintiff, he might have sued alone; but the evidence proves that it was partnership money.

HOLROYD, J.—I agree with the Attorney General that if an express promise is made to one of several partners, he may sue alone, provided his interest is several; but if the legal effect of the promise is to make him trustee for his partners, the action should be brought according to the interest, although the engagement is entered into with him personally. I think the nonsuit in this case was right. There is no occasion to give any judgment on the second point. (*a*)

Rule discharged.

(*a*) *Littledale*, J. was absent.

1824.

Friday,
November 19.

Where a bill broker discounted a bill of exchange for a stranger, upon being merely satisfied with the goodness of the acceptance, without asking his name, or any other question, and it turned out that the bill had been stolen:— Held, in an action by the broker against the acceptor, that it was for the jury to say whether the plaintiff had taken the bill under circumstances which ought to have excited the suspicion of a prudent and careful man, and the jury having found for the defendant, the Court refused to set aside the verdict.

GILL *v.* CUBITT and others.

ASSUMPSIT by the indorsee against the acceptors of a bill of exchange, drawn by one *R. Evered* on the 19th *August*, 1823, at two months, for the sum of 71*l.* 1*s.* 11*d.* Plea, non assumpsit, and issue thereon. At the trial before *Abbott*, C. J. at the *London* Adjourned Sittings after last *Hilary* Term, the plaintiff in the first instance rested his case on the usual proof of the hand-writing of the drawer and acceptors. The case in defence was this:—On the 20th *August*, 1823, a clerk of the defendants, who are tradesmen in *London*, made up a parcel by their direction, containing some patterns of goods, and a letter in which were enclosed three bills of exchange, one, the bill in question, another for 50*l.*, and the third for 43*l.* 12*s.*, and addressed it to Mr. *Evered*, a manufacturer at *Birmingham*. The defendants' porter, on the same day, booked the parcel at the *Green Man and Still* coach office, to go by the *Birmingham* coach. The parcel arrived at its destination, but upon examining its contents it appeared that the letter had been opened, and the three bills taken away. On the following day Mr. *Evered*, the drawer, advertised the loss of the bills in two newspapers, and gave the defendants notice of the loss. In reply to this case, it was proved on the part of the plaintiff, who is a bill broker in *Lombard Street*, that on the morning of the 21st *August* the bill in question was brought to his office, between nine and ten o'clock, by a person of respectable appearance, for the purpose of being discounted. The plaintiff being absent from *London*, his nephew, who assisted him in his business, and was the only witness to the transaction, stated that he did not know the name of the person who brought the bill, but thought that his features were familiar to him. At first he declined discounting the bill, because he did not know the names of the acceptors. The stranger then informed him, that he had brought some other bills to be discounted a few days before, and it would be found on inquiry that the parties who had accepted the bill in ques-

tion, were of undoubted respectability. The stranger, whose appearance and manner were free from suspicion, then left the bill at the office, saying he would call again in the course of the day for the amount, and that in the mean time the witness might make the necessary inquiries. The witness did inquire, and satisfied himself that the acceptors were persons of credit and respectability. In about two hours the stranger returned, and having indorsed the bill in the name of *Charles Taylor*, the witness gave him the full value for it, minus the usual discount, and a brokerage of two shillings. The witness stated that he did not ask the person either his name or address, or whether he brought the bill on his own account or any other persons, or how he came possessed of it. He stated that it was not the usual practice of the plaintiff's office to make any inquiries respecting any of the parties to a bill presented for discount, except as to the acceptors, and if the plaintiff was satisfied with the goodness of the bill in this respect, it was immediately discounted. Under these circumstances the Lord Chief Justice left it to the jury to say whether the plaintiff or his nephew (which was the same thing) had taken the bill in question under circumstances which ought to have excited the suspicion of a prudent and cautious man; for if he had so taken it, although he had given full value, yet in point of law they ought to find their verdict for the defendant. The learned Judge commented upon the improper practice, stated to exist in the plaintiff's office, of discounting bills for any persons whose features were known, but whose names and addresses were not known, without asking any questions, and then put it to the jury what they would say if a board were affixed over an office door, in the city of *London*, with this notice, "Bills discounted for persons whose features are known, and no questions asked." Under this direction the jury found a verdict for the defendant.

Gurney, in *Easter* Term last, obtained a rule nisi for a new trial, on two grounds; first, that the plaintiff having bonâ fide taken the bill in the usual course of business, and

1824.

GILL v. CUBITT.

given full value for it, was entitled to recover the amount from the acceptors; and second, that the Lord Chief Justice had left the case too strongly to the jury, by comparing it to the case of a person giving public notice that he will discount bills for any body whose features are known, without asking questions.

Scarlett and *Parke* now shewed cause. There is no ground for making this rule absolute. Where a bill or note has been acquired by theft, or other improper means, and afterwards comes into the hands of a holder for valuable consideration, it is incumbent on him, before he can charge the acceptor or maker, not only to shew that he has actually given value for it, but also that he has come by it under such circumstances as are entirely free from suspicion, or has used due caution in inquiring into the manner in which it has been obtained by the person from whom he derives title. It is a principle which cannot be shaken, that if a party cannot make out both these propositions, he can have no locus standi in a court of justice. In cases of this nature it is a question of fact for the jury, whether the plaintiff has taken the bill under such circumstances of good faith and caution as entitled him to recover. This rule was laid down in the late case of *Egan* v. *Threlfall*,(a) where the question

(a) EGAN and another v. J. THRELFALL.

A Bank of *England* note for 1000*l.* dated 12th *October*, 1820, was lost in *London*, in *April*, 1821, and in *June*, 1822, was presented for change to a money broker in *Liverpool*, by a person with whom the latter was well acquainted, but who was then in pecuniary difficulties, and he changed it by giving bills, which had some time to run, and cash, deducting a commission, without asking any questions how the holder came possessed of it:—Held, in an action of trover by the true owner against the money broker, that it was for the jury to say whether the defendant had received the note fairly and bonâ fide in the ordinary course of business and had given full value for it; and the jury having found for the plaintiff, the Court refused to disturb the verdict.

TROVER for a Bank of *England* note for 1000*l.* payable to bearer, dated 12th *October*, 1820. Plea not guilty, and issue thereon. At the trial before *Holroyd*, J., at the Summer Assizes for *Lancashire*, 1823, the case was this:—The plaintiffs are solicitors in *London*, and on the 3d *April*, 1821, they drew a check on their bankers, Messrs. *Snow* and *Paul*, for 7843*l.* 9*s.* 3*d.* for the purpose of paying the amount into the hands of the Cashier of the Bank of *England*, to the credit of the Accountant-General. Their clerk having obtained payment of the check in seven one thousand pound and other notes of smaller amount, carried the money to

was, whether the plaintiff had taken the bank-note under circumstances that ought to excite the suspicion of a rea- 1824. GILL v. CUBITT.

the Bank of *England*. He took the notes out of his pocket-book in order to count them over with the bank clerk, and discovered that one of the thousand pound notes, dated 12th *October*, 1820, was missing. The plaintiffs being informed of the loss, immediately advertised the note in several morning and evening *London* newspapers. No traces of the note were, however, discovered until the 3d *July*, 1822, when it was paid into the Bank of *England* by Messrs. *Jones, Lloyd* and Co. as part of a sum of 46,611*l*. On inquiry it was discovered that Messrs. *Jones, Lloyd* and Co. had received the note of Messrs. *Williams, Burgess* and Co., with whom the defendant kept a banking account, and from whom they received it by remittance from *Liverpool*, with other money, on the 26th *June*, 1822. The defendant is a banker, general dealer, spirit merchant, partner in a brewery, and bill broker, at *Liverpool*. On inquiry of him how he came possessed of the note, he stated to the plaintiffs' agent residing at *Liverpool*, that on the 24th *June*, 1822, he discounted it for a Mr. *Isaac Henry*, a slop-seller and tavern-keeper at *Liverpool*, and gave him full value for it in bills to the amount of 704*l*. and the remainder in bank-notes and cash, allowing him 5 per cent. interest on the bills for the time they had to run, and deducting one-eighth per cent. commission. He made no inquiry of Mr. *Henry* how he came possessed of the note; he saw that it was a good one, and that was enough for him. At that very time the plaintiffs' agent was suing *Henry*, at the instance of the defendant and his partners in his brewery concern, for a debt of 12 or 15*l*. for ale sold by the firm, and *Henry* had given a cognovit for the amount. The same witness stated that *Henry* had taken the benefit of the Insolvent Debtors Act six months previous to the time of the transaction in question; and it appeared from his schedule delivered on that occasion, that he admitted himself to be the defendant's debtor for spirituous liquors sold and delivered to the amount of 3*l*. 0*s*. 6*d*. The newspapers in which the plaintiffs had advertised the note were in general circulation in *Liverpool* at that period. The defendant stated that there was no other person present at the transaction but *Henry*. He kept no account of the transaction in his books, except of the bills which were entered in his bill-book, and which he produced to the witness. He could not state how the difference between the 704*l*. and the remainder of the 1000*l*. was made up, except that it consisted of bank-notes and gold, but in what description of notes he could not say, as he had no entry of the transaction. He admitted that it had been his custom for some years to enter all such transactions, but as it did not answer he had discontinued it. On the part of the defendant, it appeared from the evidence of his clerk, that on the 24th *June*, 1822, he was present when the note in question was brought to the defendant by *Henry*, to have it changed. The defendant had had frequent transactions with *Henry* in discounting bills for him. *Henry* was a slop-seller, and kept the *American* Tavern, which was frequented by seafaring people. He said

1824. Gill v. Cubitt.

sonable man, conversant with business. It is, therefore, not sufficient for the plaintiff to say that he has paid the full

he wanted bills of exchange and cash for the note; that he wanted the change for a person named *Hughes*, then lodging at his house; and that the defendant must not charge more than one-eighth commission. The usual commission charged at *Liverpool* for changing large notes was one-fourth, and *Henry* said that the defendant must divide the commission with him, as he wished to have some profit by the transaction. The defendant agreed to take only one-eighth per cent. if *Henry* would take part of the amount of the note in bills of exchange, and the rest in cash, which he consented to do. Whereupon the defendant produced several bills for *Henry* from his pocket-book to select which he pleased, and he took eight, amounting to 704*l.*, upon which he was allowed 5 per cent. for the time they had respectively to run. The defendant gave him the remainder of the amount in bank-notes and cash, deducting 25*s.* for his commission. Witness could not give any precise account of the bank-notes which were given to *Henry* with the bills. They frequently entered the numbers of 20*l.* notes, and notes of a larger amount. On the same day the note was remitted to defendant's bankers in *London*, Messrs. *Williams*, *Burgess* and Co. The bills given to *Henry* by the defendant passed current, as cash, in *Liverpool*, in the purchase of merchandize. Two of the bills were dishonoured when due, but the defendant afterwards took them up. *Henry* was a customer of the defendant in discount transactions, and the witness knew of no other dealings between them except in discounting bills. The defendant's remittances to the house of *Williams*, *Burgess*, and Co. amounted to 200,000*l.* per annum. Mr. *Henry* was also called as a witness for the defendant, and he stated that the note had belonged to a Mr. *Hughes*, who was, at the time of the transaction in question, lodging at his house, waiting for a vessel to go to *America*. He had been at his house in the previous month of *November*, for the same purpose. *Hughes* told him he wanted a Bank of *England* note for 1000*l.* changed. Witness said that he could not get so large a note changed without paying a commission of one-eighth, which he agreed to give. *Henry* then took the note to the defendant, and told him he wanted it changed for *Hughes*; that some promiscuous bills would do, and the remainder in cash, as *Hughes* wanted to purchase some goods to take with him to *America*. The defendant then said, "Very well; I'll do it for you," and produced some bills, eight of which witness selected, amounting to 704*l.*, and received the remainder in cash and bank-notes, paying 25*s.* commission. The witness had first called at a Mr. *Aspinall's*, a bill broker, to get the note changed, but as that person had not cash enough about him at the time, he proceeded to the defendant's. Between witness's house and the defendant's, there were three or four respectable banking houses. Witness could not give a correct description of the amount of the bank-notes he received with the bills. There were two or three of 20*l.*, he believed a 30*l.*, and could not say that there was not a 10*l.* He purchased dou-

value for the bill; he must go farther, and shew that he has used due diligence and caution in ascertaining the right of the party from whom he received it; for if he does not do that, he cannot be considered as having received it bonâ fide. It is true that in *Lawson* v. *Weston*, (*a*) Lord *Kenyon* is reported to have held, that it was sufficient for a person who discounted such a bill, to shew that he paid value for

1824.
GILL v. CUBITT.

bloons for *Henry* to the amount of 300*l*. *Hughes* soon afterwards went on board the vessel, and sailed for *America*. None of the bills given in exchange for the note were produced in evidence. Under these circumstances the question was, whether the plaintiffs could maintain trover for the bank-note.

For the plaintiffs it was contended, first, that there was no satisfactory proof that the defendant had given full value for the note; and second, that supposing full value to have been given, still, if the jury were satisfied that the defendant had taken the note under circumstances which ought to excite suspicion in the mind of a prudent and cautious man, and induce him to make inquiries as to the manner in which a note of so large an amount had been obtained by *Henry*, and he neglected to make such inquiries, the plaintiffs' right of recovering could not be disputed.

For the defendant it was contended, that the bonâ fide payment of the value of the note in the ordinary course of business, was an answer to the action, and the plaintiffs could not recover. The cases of *Miller* v. *Race* (*b*) and *Lawson* v. *Weston* (*c*) were relied upon.

HOLROYD, J. told the jury, if they were of opinion that the defendant had received the note fairly and bonâ fide in the ordinary course of business, and had given full value for it, he would be entitled to a verdict; but if, on the other hand, he had received it out of the ordinary course of business, and had not in fact given the full value for it, then the plaintiffs would be entitled to a verdict.

The jury found for the plaintiffs.

Scarlett, *Brougham*, and *Tindal* for the plaintiffs; *Cross*, Serj. *Parke*, and *Wightman* for the defendant.

Copley, A. G. in *Michaelmas* Term last, moved for a new trial, on the ground that the facts proved in evidence did not warrant the conclusion which the jury had drawn; but

THE COURT were clearly of opinion that the case had been properly left to the jury by the learned Judge, and they said they saw no reason to be dissatisfied with the verdict.

Rule refused.

(*a*) 4 Esp. 56. (*b*) 1 Burr. 452. (*c*) 4 Esp. 56.

1824.

Gill v. Cubitt.

it; but the propriety of that decision has ever since been questioned. The interests of the public in transactions of this nature, require that a much more extended rule should be adopted. The most dangerous consequences will ensue if this Court should lend its countenance to the doctrine, that a party in possession of a stolen bill or note, shall have the power of negociating it, and conferring a title upon another, without being subjected to any examination into the means by which he has obtained possession. If a different principle be adopted, it will open wide the door to fraud and theft, and deprive innocent parties of all protection against plunder. This may be prevented by laying it down as a rule, that persons who take such securities, even for valuable consideration, shall be bound to exercise that ordinary vigilance and caution which is to be expected from men conversant with the business and transactions of life. In that view of the case the Lord Chief Justice left it properly to the jury as a question of fact, whether the plaintiff had taken the bill under circumstances which ought to have excited the suspicion of a prudent and careful man, conversant with business. The facts of the case fully justified the strong observations made by the learned Judge to the jury, who were to draw their conclusion from the evidence. No improper conduct is insinuated against the plaintiff; but if, from want of due caution, or the careless manner in which the business of his office is conducted in his absence, he has afforded a facility for the disposal of this bill of exchange, which was unquestionably stolen by some person, the loss must fall upon himself.

Gurney and *F. Pollock* contrà. This case is free from any question of mala fides, and therefore the first point for the consideration of the Court is, whether a person who has bonâ fide taken a bill of exchange, and given the full value for it, is entitled to recover the amount from the acceptor, if it turns out that the bill has been lost or stolen. Now there is no dispute, that the plaintiff gave the full value for the bill, nor is there any doubt that he took it bonâ fide

under a belief that the person who presented it for discount had a right to negotiate it. The plaintiff's clerk took every precaution which might reasonably be expected in a transaction of this nature, considering the sort of business which the plaintiff carried on. It is not because, upon a review of the transaction, more caution might have been properly exercised, that the plaintiff is to be deprived of his right of recovering against the acceptor of an instrument of this description. Here are two innocent parties, and the question is, who is to suffer? By the law of *England*, of which the custom of merchants is a part, if a person bonâ fide acquires the possession of a bill of exchange, upon good consideration, he is entitled to hold it against all the world, without any question as to caution or want of caution, in the manner in which he has acquired it. If want of caution is to be the test in a case of this nature, it is manifest that the want of caution here, is on the part of the defendants, for if this bill had been indorsed or accepted specially, it would have prevented any loss to the person really entitled to its value. If persons transmitting inland bills to distant parts of the country will not take the trouble to indorse them specially, but merely leave them in blank, and any accident happens, the loss must fall upon themselves, and not upon a bonâ fide innocent holder for value. It would be a novel proposition, in commercial law, to hold that a party discounting a bill is bound to investigate the title of the person from whom he receives it. Such a doctrine would have the effect of clogging the circulation of instruments of this description, and would impose upon bankers and merchants such difficulties as would completely frustrate the end and object of such securities. The case of *Lawson* v. *Weston* is an express authority upon this point, and though it is said that the decision there, has always been questioned, yet there is no case in which it has been overruled. There the plaintiffs, who were bankers, had discounted the bill in the usual course of their business for a person who brought it to their shop, but who was unknown to them. It was contended by the defendant, that although a person might

1824.

GILL v. CUBITT.

pay a bill to which he was a party, to one who had come dishonestly by it, by reason of the personal liability attached to his name on the bill, a banker or any other should not discount a bill for a person unknown without using due diligence to inquire into the circumstances, as well respecting the bill, as of the person who offered to discount it. But Lord *Kenyon* said "that to adopt the principle of the defence to the full extent stated, would be at once to paralyze the circulation of all the paper in the country, and with it, all its commerce. The circumstance of the bill having been lost might have been material if they could bring knowledge of that fact home to the plaintiffs. They might or might not have seen the advertisement, and it would be going great length to say that a banker was bound to make inquiry concerning every bill brought to him to discount; it would apply as well to a bill for 10*l.* as for 10,000*l.*" That case therefore decides the very question now raised. It is a decision which has never been overturned, and although the amount of the bill was 500*l.* yet the case was not carried farther. That decision turned upon the bona fides of the transaction, and so must the decision here. The principle upon which that case was founded was not new; it had been previously recognized in *Miller* v. *Race* (*a*), *Grant* v. *Vaughan* (*b*), and *Peacock* v. *Rhodes* (*c*). On the first point, therefore, the jury were not justified in the conclusion they have drawn. Then secondly, the learned Judge left the case to the jury with observations which the facts did not warrant. Undoubtedly if a person gives public notice that he will discount bills for persons whose faces are only known, and that no question shall be asked, that would be such cogent evidence of fraud, and misconduct, as would justify the jury in finding a verdict for the defendant. Such a notice would be tantamount to an invitation to bring stolen goods. But there was no evidence in this case to justify that mode of putting the case to the jury. Here, assuming that the plaintiff was not sufficiently cautious, yet still he acted bonâ fide and gave full value for the bill. The case of *Egan* v. *Threlfall* was

(*a*) 1 Burr. 452. (*b*) 3 Burr. 15, 16. (*c*) Doug. 611.

1824.



GILL v. CUBITT.

decided on the ground of fraud, but here there was no pretence for imputing fraud, and therefore the case was improperly left to the jury.

ABBOTT, C. J.—If upon re-consideration of the evidence, it appeared to me that the jury could reasonably have drawn a conclusion different from that which they have drawn, I should be personally very anxious that this case should undergo another trial, lest any thing that fell from me by way of remark or observation, might be supposed to have had too much influence upon their minds. But being of opinion that the only proper and safe conclusion which could be drawn from the evidence has been drawn by the jury, and that the same conclusion would be drawn if another trial took place, I think this rule ought to be discharged. I agree with the counsel for the plaintiff that this case is hardly distinguishable from *Lawson* v. *Weston*. If there be any distinction, it is this, that in the present case the plaintiff's nephew said it was not usual with them to make any inquiry or ask any questions if bills were brought to them by persons whose features they supposed themselves to know, provided they were satisfied with the names of the acceptors. That circumstance does not appear in the reported case of *Lawson* v. *Weston*, and perhaps that may be a stronger case than this. I cannot but persuade myself that if my Lord *Kenyon* had anticipated the consequences that would follow from the rule laid down in that case, that learned Judge would have paused before he came to the decision there propounded. Since the determination of that case, the practice of robbing stage-coaches and other conveyances, of securities of this kind, has been very considerable, and personally I cannot forbear thinking that that practice has received encouragement from the facility which has been given to the disposal of stolen property of this description either in *London* or in the country, from the promulgation of the principle there laid down. I should extremely regret, if I were to do or say any thing, sitting in the seat of judgment, that might have the effect or reasonably be supposed to have

1824. GILL v. CUBITT.

the effect of impeding the commerce of the country, by preventing the due and easy circulation of paper. But, I am decidedly of opinion, (and I cannot express myself too strongly,) that no injury will be done to the commerce of the country by a decision that this plaintiff cannot recover. It appears to me, on the contrary, to be for the interest of commerce, that no person should take a security of this kind from another, without some reasonable caution and inquiry. If he take such a security from a man whom he really knows, or if he finds upon inquiry that there is nothing amiss in the title of the person who presents it, he has done all that any person can fitly and properly do. But if it is to be laid down as the law of this land, that a person may take a security of this kind, and give his money for it to a man of whom he knows nothing, and of whom he makes no inquiry at all, it appears to me that such a decision will be rather injurious than beneficial to commerce, by reason of the encouragement it will afford to the purloining, stealing, and defrauding persons of securities of this kind. The interest of commerce requires, that bonâ fide and real holders of bills, known to be such, shall have no difficulty thrown in their way in parting with them; but the interest of commerce does not require that any individual should be enabled to dispose of bills or notes without being subject to inquiry. In order to prevent the encouragement which the decision in *Lawson* v. *Weston* is calculated to afford in the disposal of notes and bills improperly come by, I think the sooner it is known that that case is at least doubted by this Court, the better it will be. I wish doubts had been cast upon that case at an earlier period, for if that had been done, probably this plaintiff would not have suffered. Coming to the facts of this case, they are these: that the young man entrusted with the management of the plaintiff's business during his absence, acting according to the course which the plaintiff himself when present would have followed, gave the money for this bill to a person of whom, though he supposed he knew him, he really knew nothing. This is done at a very early hour, between nine and ten o'clock on the very next day after the

bill was lost. I cannot help saying that, in my opinion, the practice stated to have existed in the plaintiff's office is at least very inconvenient for the reasons I have given. It seems to me, as I have already said, that it is a great encouragement to fraud and roguery, and it is the duty of the Court to lay down such rules as will tend to prevent and not afford encouragement to such practices. Notwithstanding the sentiments of reverence which I most unfeignedly entertain for every thing that fell from Lord *Kenyon*, I cannot help thinking that the view which he took of this subject in the case of *Lawson* v. *Weston* was not correct, and therefore I am of opinion, for the reasons I have given, that this verdict ought not to be disturbed.

BAYLEY, J.—I agree, that the way in which my Lord Chief Justice put this case for the decision of the jury, by asking what would be their judgment if a man were to write on a board over his shop, "Bills discounted for strangers, if they have good names on them, without any questions asked," was a very strong way of submitting the case to their consideration. But I think it was no more than the facts of this case warranted, and that he was laying down, as the general rule, that which exactly squared with the particular facts of this case. Taking it that this was the manner in which the plaintiff commonly dealt, and that that was his general habit as a broker, it would have warranted such an advertisement as that which was here described; and if in general that was not his course and habit of business, why then, in this particular instance, he deviated from his general course. In this case a party goes to the plaintiff's office, between nine and ten o'clock in the morning, to discount a bill. The clerk would naturally ask the party his name. But does he do so? No. He knows his features, at least he thinks he does; he does not know where he lives, and, in fact, he knows nothing at all about him. But the bill is left for a couple of hours, and at the end of that time the party comes back again. The clerk then has the opportunity of asking his name, and whether he comes on his own

1824.
Gill
v.
Cubitt.

account, or from any and what house. But no question of that kind is put to him. Under these circumstances I think it was properly put by the Lord Chief Justice to the jury to say, whether due caution had been used in this particular instance. If due caution had not been used, then the plaintiff had not discounted this bill in the usual and ordinary course of business, and in the way in which business, properly and rightly conducted, would have required. It is said that the question which the Lord Chief Justice should have put for the consideration of the jury, in his direction to the jury, was this,—"was this bill taken bonâ fide and for valuable consideration." I admit that, in general, that is the question which is put; but I think it was parcel of the bona fides whether the plaintiff had asked those questions which, in the ordinary and proper manner in which business ought to be conducted, a party ought to ask, and may be fairly expected to ask. I think from the manner in which my Lord Chief Justice presented the case to the jury, he put that as being part and parcel of the bona fides. It was so put in former cases at Nisi Prius. In the case of *Miller* v. *Race*, Lord *Mansfield* says, "Here an innkeeper took the note bonâ fide in his business, from a person who made the appearance of a gentleman. Here is no pretence or suspicion of collusion with the robber. For this matter was strictly inquired and examined into at the trial; and is so stated in the case, that he took it for a full and valuable consideration in the usual course of business. Indeed, if there had been any collusion, or any circumstance of any unfair dealing, the case had been much otherwise." Now the question put by my Lord Chief Justice for the consideration of the jury, whether a party uses due caution or not, is, in other words, putting to them, whether he took it in the usual course of business, for the course of business must require, in the usual and ordinary manner of conducting it, a proper and reasonable degree of caution necessary to preserve the interests of trade. The next case in order of time is *Grant* v. *Vaughan*. In that case *Wilmot*, J. says, "The note appears to have been taken by him fairly and bonâ fide, in the

1824.

Gill
v.
Cubitt.

course of trade, and even with the greatest caution. He made inquiry about it, and then gave the change for it; and there is not the least imputation or pretence of suspicion that he had any notice of its being a lost note." That learned Judge did not consider the question of bona fides to be merely, whether the note was taken by a party without having any real suspicion in his own mind, but whether he had taken it in the usual course of trade, and with proper caution. In *Peacock* v. *Rhodes*, a shopkeeper at *Scarborough* took from a perfect stranger a bill of exchange in payment of goods which the stranger bought of him in the way of his trade, and Lord *Mansfield* said, under those circumstances, "the question of mala fides was for the consideration of the jury. The circumstance that the buyers and the drawers were strangers to the plaintiff, and that he took the bill for goods on which he had a profit, were grounds of suspicion very fit for their consideration. But they have considered them, and have found it was received in the course of trade, and therefore the case is clear." These are authorities to shew that the question here was a proper question for the consideration of the jury, namely, whether the plaintiff did inquire with that degree of caution which, in the ordinary course of business, a prudent person ought to use. That was the question put by the Lord Chief Justice to the jury, and they having exercised their judgment upon it, I think their decision is one with which there is not any reason to be dissatisfied. On the contrary, I think the interests of trade require that it should be laid down as a rule, that a party cannot be considered in law as acting bonâ fide, or with due caution and diligence, if he takes a bill of exchange from a person whose features alone he knows, without knowing what his name is, where he lives, or whether he is a person with whom he has been in the habit of trading. I agree with my Lord Chief Justice that if in this instance we were to hold that the plaintiff had exercised due caution, it would certainly be giving a great facility to the disposal of bills of exchange, which have been lost or stolen, by persons who have found or dishonestly

1824.

GILL v. CUBITT

obtained them. It appears to me, therefore, that my Lord Chief Justice has laid down the proper rule applicable to the case, and that his direction was consistent with the doctrine laid down in former cases, and as I see no reason to be dissatisfied with the finding of the jury, I think we ought to discharge this rule.

HOLROYD, J.—I think there is not sufficient ground to warrant us in granting a new trial. The rule laid down by the Lord Chief Justice to the jury was correctly propounded. Before the plaintiff could recover in this action, it was requisite for him to shew not only that he had given a valuable consideration for the bill, but also that he should establish, to the satisfaction of the jury, that he had taken it bonâ fide. If he took it for reasons of profit arising from interest or commission, under circumstances affording reasonable ground of suspicion, without inquiring whether the person who brought it came by it honestly or not, or if he took it merely because it was drawn upon an acceptor with whom he was satisfied, then he took it at a risk whether the bill was stolen or not, and therefore he took it at his peril. I cannot agree with the doctrine laid down by Lord *Kenyon* in *Lawson* v. *Weston*. Whether a bill or note has been taken bonâ fide, involves the question whether it has been taken with due caution; and that is a question entirely for the consideration of the jury, under all the circumstances. Discounting a bill merely because the party is satisfied with the responsibility of the acceptor, and without inquiring how the holder came possessed of it, is not sufficient to entitle the discounter to maintain an action upon the bill, if it turns out that the holder came by it dishonestly. The risk in that case falls upon the party who so acts without due caution, and the law will not assist him in recovering the amount. The circumstances under which this bill was taken, tend strongly to shew that when the plaintiff took the bill he did not chuse to make inquiry how the party had obtained possession of it, but rather than refuse the bill, took upon himself the risk, in order to get the profit by the

discount and commission. I therefore think that the direction of the Lord Chief Justice was perfectly correct in point of law, and that the jury have drawn the proper conclusion from the evidence.

LITTLEDALE, J. was in the Bail Court.

Rule discharged.

The KING v. The Inhabitants of GREAT WIGSTON.

Saturday, 20th Nov.

An infant can do no act to bind himself, except such as is clearly for his own benefit; therefore, though he may bind himself an apprentice, he cannot dissolve the indenture. Where an infant bound himself apprentice for 7 years, and after serving 3 years quarrelled with his master, paid him sixpence for the remainder of his time, and then left him, and bound himself to another master in another parish:—Held, that the apprentice had no power to dissolve the first apprenticeship, and that the second, therefore, was invalid, and conferred no settlement.

TWO Justices, by their order dated 3d *February*, 1823, removed *John Sampson*, *Mary*, his wife, and *Olive*, their child, from the parish of *St. Margaret*, in the borough of *Leicester*, to the parish of *Great Wigston*, in the county of *Leicester*; and the sessions, on appeal, confirmed the order, subject to the opinion of this Court upon the following case.

The pauper, when he was eleven years old, was bound apprentice to *John Humberston*, of the parish of *Great Wigston*, for the term of seven years. The indenture was executed by the master, the pauper, and *John Bullivant*, the grandfather of the pauper, the pauper's father being a soldier abroad. The grandfather paid a premium of 7*l.* to *Humberston*. The pauper served *Humberston* under this indenture for between three and four years at *Great Wigston*, when some disagreement taking place between them, *Humberston* agreed to sell the pauper the remainder of his time for sixpence. The pauper accordingly paid *Humberston* the sixpence, and left him the same day. The indenture had never been in the possession of any of the parties, but had been kept for all the parties by the person who prepared it, and no application was made for it to be delivered up. The grandfather was not a party to the agreement for parting entered into between the pauper and his master, and was not even privy to it. A few days after the pauper left *Humberston* he bound himself apprentice to

1824.

The King v. The Inhabitants of Great Wigston.

Thomas Waine, of the parish of *Saint Mary*, in the borough of *Leicester*, for seven years, and served him under the indenture for five years, and resided during the whole of that time in that parish.

S. M. Phillipps and *Humfrey*, in support of the order of sessions. The pauper was properly removed to *Great Wigston*. The second indenture was void, because the first was never legally determined. The pauper himself could not put an end to it, because he was an infant, and, therefore, incapable of making any contract except for his own benefit. Now the dissolution of the first indenture was an act prejudicial to him, and one consequently which the law would not allow him to do; this case, therefore, is in that important respect perfectly distinguishable from *Rex* v. *Mountsorrel* (*a*), and cannot be governed by it. The first contract having been made by deed could not legally be dissolved by parol, even if all the contracting parties had joined in the dissolution; *Rex* v. *Bow* (*b*) and *Rex* v. *Skeffington* (*c*); but they did not all join, for the grandfather, who was a party to the first indenture, was not a party to its dissolution, nor even privy to the fact; and *Rex* v. *Austrey* (*d*) is an authority to shew that it was necessary that all the parties should join. Lastly, the dissolution of the first indenture was a fraudulent transaction on the part of the master, because he had received a considerable premium with the apprentice, and was, therefore, bound either to keep him during the whole of the time, or to return part of the premium, and on that ground also the dissolution is clearly void. Therefore, the first indenture remaining valid, and the second being, for the reasons already stated, a nullity, the pauper could gain no settlement under that, and consequently has been properly removed to *Great Wigston* as his only place of legal settlement.

G. Marriott and *Simons*, contrà. There is nothing upon

(*a*) 3 M. and S. 497.
(*b*) 4 M. and S. 383.
(*c*) 3 B. and A. 382.
(*d*) Burr. S. C. 441.

the face of the case to warrant the assertion that the dissolution was a fraudulent act on the part of the master, and where fraud is not expressly found, the Court will not presume it. There is no real distinction between this case and *Rex* v. *Mountsorrel*. There the dissolution was by parol, and the apprentice was an infant at the time; and here the dissolution was beneficial to the apprentice, because the case finds that he and the master were mutually discontented. *Rex* v. *Skeffington* differs from this case, because the Court there decided upon the ground that it was not shewn that the apprenticeship had ever been well constituted; and *Rex* v. *Austrey* is equally distinct, for that was the case of a parish binding, and, therefore, the apprentice there not having been a party to the indenture could not possibly have any power to dissolve it. The grandfather not having joined in the dissolution here is perfectly immaterial, because he had no authority to become a party to the indenture while the father of the apprentice was alive; therefore, having interfered unnecessarily in the deed, his interference could not be necessary in the agreement. In this view of the case the dissolution of the first indenture was legal and complete, and the proper place of the pauper's settlement is the parish in which he served under the second indenture.

Abbott, C. J.—I am satisfied that the sessions have done right in settling this pauper in the parish of *Great Wigston*. It is a general rule of law that an infant cannot do any act to bind himself, except such as is evidently for his own benefit. The act of binding himself an apprentice has been considered as coming within the exception, and upon that principle it has been held that an infant may be a party to an indenture of apprenticeship. But if the act of binding himself an apprentice is for the benefit of the infant, it is impossible to contend that the act of dissolving such a contract is for his benefit also; for such a proposition clearly involves a contradiction in terms and an absurdity in fact.

1824.

The King v. The Inhabitants of Great Wigston.

Then having ascertained what is the general rule of law, and what the exception to it, it remains only to inquire whether this particular case comes within that exception; or, in other words, whether the dissolution of the apprenticeship here was for the benefit of the infant. In *Rex* v. *Mountsorrel* the master had run away and deserted the apprentice, the latter, therefore, was no longer in a situation to reap any of the advantages expected to result from the contract. Upon that ground the Court did think that in that particular case it was for the benefit of the apprentice to be released from the indenture, and in my opinion rightly, because otherwise he must have remained bound by a contract from which he could not possibly derive any advantage. But here there are no facts presented to our notice from which we can infer that the dissolution of the apprenticeship was beneficial to the infant, and, therefore, as the case does not come within the exception it does come within the general rule, and the first binding never having been legally dissolved, the second is a nullity, and no settlement could have been gained by service under it. On this single ground I am of opinion that the order of sessions must be confirmed.

Bayley, J.—I am of the same opinion. The sessions were clearly right in the decision to which they came upon this case; the only error they have committed, and of which the Court have a right to complain, is, that they have sent a case for our opinion upon which no reasonable mind could entertain a doubt.

Holroyd, J. concurred.

Order of sessions confirmed (*a*).

(*a*) *Littledale*, J. was sitting at Nisi Prius at Guildhall.

1824.


The KING *v.* The Inhabitants of LUTTERWORTH.

Saturday, 20th Nov.

Where a parish is incorporated with others for the maintenance of its poor, and a guardian is appointed, under the 22 *G.* 3. c. 83.; the churchwardens and overseers may still bind out poor children apprentices and the indentures need not be signed by the guardian.

BY an order of two Justices, *Mary*, the wife of *William Hickley*, a soldier, and *Francis*, their son, aged six months, were removed from the parish of *Lutterworth* to the parish of *Huncote*, both in the county of *Leicester*; and the sessions, on appeal, quashed the order, subject to the opinion of this Court upon the following case.

William Hickley, a poor child, of the parish of *Broughton Astley*, was bound apprentice by the churchwardens and overseers of that parish, with consent of two magistrates, by indenture dated 19th *January*, 1807, to *Benjamin Elliott*, of the parish of *Huncote*; and he served him in *Huncote* under that indenture for the term of his apprenticeship. At the time when the pauper was bound out, the parish of *Broughton Astley* formed part of the incorporation of the house of industry at *Ellesthorpe*, in the same county, under the provisions of the 22 *G.* 3. c. 83. *George Lakin* was appointed guardian of the poor of *Broughton Astley* at *Easter*, 1803, by two magistrates. That appointment is in existence; but though *George Lakin* continued to act as guardian for *Broughton Astley* for several years afterwards, and was acting in that capacity at the time the boy was bound out, he was not made a party to that indenture, nor can any subsequent appointment be found.

G. Marriott and *Simons*, in support of the order of sessions. The indenture of apprenticeship in this case was not signed by the guardian of the poor, and consequently was void ab initio, for the signature of the guardian is made indispensably necessary by the 22 *G.* 3. c. 83. s. 7. That section imparts to every guardian of the poor, "all the powers and authorities given to overseers of the poor by any other act or acts of parliament," and enacts that every such guardian "shall to all intents and purposes, except with regard to the making and collecting of rates, be an

1824.

The King v. The Inhabitants of Lutterworth.

overseer of the poor for the parish or township for which he shall be so appointed guardian;" and then, after enumerating various acts to be performed by the guardian, provides that "in all cases where such guardian of the poor shall be appointed as aforesaid, neither the churchwardens or overseers of the poor shall interfere or intermeddle in the care and management of the poor." The case finds that a guardian of the poor was appointed for this parish in the year 1803, and that he continued to act in that capacity several years, and was so acting at the time when the pauper was bound; the Court, therefore, must presume that he was regularly re-appointed, and that he continued all that time to hold the office de jure, as he was in the first instance invested with it de facto: and then it follows that he, and he only, should have signed the indenture, and that the churchwardens and overseers had no authority to interfere in the matter. The preceding statute of the 20 *Geo.* 3. cap. 36. throws some light upon the statute now under consideration, and is important to the due decision of this case. It enacts, "that when guardians of the poor are appointed, persons to whom any poor children are bound apprentices shall receive them according to the indenture to be executed by the directors and acting guardians of the poor for the binding of such poor children, in like manner as persons are now obliged by the laws in being to receive and provide for poor children appointed to be bound apprentices by churchwardens and overseers of the poor, with the assent of two Justices." Section 30. of the 22 *G.* 3. c. 83. must be construed with reference to the former statute, and that, after providing for the maintenance of poor children until they arrive at a proper age to be bound apprentices, enacts, that when they do arrive at such proper age, they shall be bound apprentices at the cost of the parish to which they respectively belong, "according to the laws in being." Now the 20 *G.* 3. c. 36. was then "a law in being," made to compel persons to receive poor children bound apprentices by guardians of the poor; and that expressly provides that the binding shall

1824.

The King v. The Inhabitants of Lutterworth.

be by the guardians and not by the churchwardens and overseers. The case of *Rex* v. *Martyr* (*a*) shews that a guardian *acting* under the 22 *G.* 3. c. 83., though not legally appointed, is competent to act as such in other matters respecting the regulation of the poor, and the statute shews that in this particular matter no other person but the guardian is competent.

S. M. Phillipps and *Humfrey*, contrà. It is not expressly found by the case that any person was legally appointed guardian of the poor of the parish to which this pauper belonged, at the time when he was bound apprentice; and the Court will not entertain an objection tending to defeat a settlement, unless it is founded upon clear and explicit facts. But, assuming that there was a guardian legally appointed, and that he was empowered by the statute to bind poor children apprentices, still there is nothing in the statute to shew that he was the only person so empowered. No clause can be found in which it is required that the guardians shall execute the indentures, though there are clauses which do require their interference in other specified matters. The guardians are indeed by section 7 invested with all the powers belonging to overseers, and therefore they are empowered, among other things, to bind out apprentices; but it by no means follows from that, that the overseers are ousted of their jurisdiction in that respect, for the latter part of that section, which directs that neither the churchwardens or overseers shall interfere, where there are guardians, has reference only to " the care and management of the poor," and not to the binding out apprentices. But section 30 is conclusive of this case, in favour of the indenture, because that enacts, that where there are guardians they shall provide for the maintenance of poor children till they are of a fit age to be bound apprentices, and that then such children shall be so bound " according to the laws in being;" not " according to this act." The law in being relating to this particular

(*a*) 13 East, 55.

1824.

The KING v. The INHABITANTS of LUTTERWORTH.

subject, and, with some few exceptions, regulating the binding of apprentices, was the 49 *Eliz.* c. 2.; this pauper was bound "according to" that law; consequently his was a valid binding, and by performing the necessary service under it, he has acquired a settlement. It is hardly necessary to add that as the indenture is to confer a settlement, and the objection is to defeat it, the Court will make every reasonable intendment in favour of the one, and against the other. *Rex* v. *Catesby* (*a*).

ABBOTT, C. J.—I am of opinion that the indenture of apprenticeship stated in this case was a valid indenture, and that the service performed under it in *Huncote* conferred upon the pauper a settlement in that parish. The seventh section of the 22 *G.* 3. c. 83. is somewhat ambiguous, and has a tendency to raise some doubt upon the point, because it certainly prohibits the interference of churchwardens and overseers in the care and management of the poor of those parishes in which guardians are appointed. But subsequent sections of the act vest in the guardians of the poor various powers, in express terms, and the thirtieth section in particular empowers them to provide for the maintenance of poor children till they are of an age to be bound apprentices, and then directs that such children shall be so bound "according to the laws in being." The 49 *Eliz.* c. 2. was one of the laws then in being relative to that subject, and that directs that parish apprentices shall be bound out by the churchwardens and overseers of the poor. The pauper was so bound, and in my opinion most properly, for I think it much more desirable that the binding should be effected by all the parish officers, or the majority of them, than by a single guardian of the poor.

BAYLEY, J.—I am of the same opinion. I think the true construction of the act is, that the guardians shall have the charge and management of poor children, till they arrive

(*a*) Ante, vol. iv. 434.

at that age when they may properly be bound apprentices, and that then their power in that respect shall cease.

1824.
The KING v. The INHABITANTS of LUTTERWORTH.

HOLROYD, J. concurred. (*a*)

Order of Sessions quashed.

(*a*) *Littledale*, J. was absent.

The KING *v.* The Justices of LINCOLNSHIRE.

Monday, 22d Nov.

The Sessions have no jurisdiction to receive an appeal in a matter of bastardy until the requisites of 49 *G.* 3. c. 68. ss. 5 and 7 have been complied with, as to the notice of appeal and entering into a recognizance. Notice of appeal for an adjourned Session for a different division of a county does not satisfy the requisites of that statute.

A Rule of practice at Sessions will not control the express words of an act of parliament.

THIS was a rule calling on the defendants to shew cause why a mandamus should not issue commanding them to enter, as of the last *Easter* General Quarter Sessions, the appeal of *John Ulyatt* against an order of two justices adjudging him to be the reputed father of a bastard child, begotten on the body of *Jane Bannister*, and to cause continuances to be entered until the next General Quarter Sessions, and then to hear and determine the said appeal. It appeared from the affidavits that the order of filiation was made on the 14th *January* last, and that the *Easter* General Sessions for the county were held on the 27th *April*. No notice of appeal having been given, nor any recognizance entered into pursuant to the 49 *Geo.* 3. c. 68. s. 7. the appellant's attorney applied to the justices assembled at the *Easter* Sessions to enter the appeal and respite it until the next *Midsummer* Sessions. The Court called upon him to prove his notice and recognizances, but being unable so to do, they refused the motion. It was stated in the affidavits in support of the rule, that the practice of the *Lincolnshire* Sessions was to receive appeals of this description without notice, and enter and respite them until the following Sessions. But on the other hand it appeared from the affidavits of the clerk of the peace and others, that the invariable practice of those Sessions was never to receive or hear any appeal in matters of bastardy unless notice was given and the re-

1824.
The King v. The Justices of Lincolnshire.

cognizance entered into as required by the statute. The appellant had in fact given notice of appeal for the *adjourned* Sessions which were held on the 6th *May*, at *Spalding*, for another division of the county.

Balguy now shewed cause. The Justices at Sessions had no jurisdiction to receive the appeal until the appellant had complied with the requisites of the 49 *Geo.* 3. c. 68. By section 5 of that statute, the party intending to appeal against an order of filiation, must give ten days notice before the General Quarter Sessions at which the appeal is to be made, and enter into a recognizance within three days after such notice with sufficient surety conditioned to try the appeal, and *upon proof* of such notice and recognizance the justices are required to hear and determine the cause and matter thereof; and by section 7 it is enacted, "that no appeal in any case relating to bastards shall be brought, received, or heard at the said Quarter Sessions unless such notice shall have been given, and such recognizance shall have been entered into in manner aforesaid, according to the provisions of this act." The giving notice and entering into the recognizance required by the statute, are conditions precedent even to the entry of the appeal, and as these conditions had not been complied with, in the present case the justices had no authority to receive the appeal. It may be true that the appellant has given notice of appeal in time for the *adjourned* Session for another division of the county of *Lincoln*, but that will not cure the objection, because the notice must be given for the "next General Quarter Sessions" of the county. *Rex* v. *The Justices of Oxfordshire* (a) is an authority to shew the necessity of giving due notice of the appeal in matters of bastardy, in order that the respondents may come to the Sessions fully apprized of the grounds of appeal.

D. F. Jones, contrà. The terms of the statute are certainly very general, but when the principal object of the

(a) Ante, vol. ii. 426.

1824.

The King v. The Justices of Lincolnshire.

legislature is considered, the Court will not construe the prohibitory part of the appeal clause too strictly. The main object of the statute was to give a more extended remedy than existed before against the reputed fathers of bastard children, with respect to the expenses incurred by parishes. Now though the appeal clause requires that the notice shall be given and the recognizance entered into within a certain time before the "*General Quarter Sessions,*" yet those words are to receive a liberal construction, for if it appears that Sessions are holden for different divisions of a county, the Sessions for each division are to be considered as General Quarter Sessions for each division respectively, and a notice and recognizance for the divisional Sessions will be a sufficient compliance with the requisites of the statute. Here there are two Sessions held for different divisions of the county, one at *Boston* and the other at *Spalding*. If the appellant was not in time to give his notice for the Sessions at *Boston*, he might enter his appeal there and have it tried at the adjourned Sessions for *Spalding*, if in the mean time he gave the requisite notice and entered into the recognizance. Now the appellant did give a proper notice and enter into the recognizance for the Sessions at *Spalding*, which is a substantial compliance with the requisites of the statute. This construction is not inconsistent with the general scope of the act, and as it is sworn to be the practice to enter appeals at the General Sessions without notice, and adjourn the hearing of them until the following Sessions, it is but reasonable that this mandamus should issue. He cited *Rex* v. *Coystan* (*a*).

Abbott, C. J.—I think the words of the statute are too strong for us to get over. They admit of no doubt whatever. The words are that "no appeal in any case relating to bastardy shall be *brought, received,* or *heard* at the said *Quarter* Sessions (i.e. the next *General* Quarter Sessions to be holden for the *county,*) unless such notice shall have been given,

(*a*) 1 Siderfin, 149.

1824.

The King v. The Justices of Lincolnshire.

and such recognizance shall have been entered into." It is clear therefore that the Sessions had no jurisdiction to enter or receive the appeal until proof was given of the notice and recognizance. Assuming the practice to be as stated (but which is denied on the other side) still a rule of practice at the Sessions cannot control the express words of the statute. The notice for the *Spalding* Sessions could be of no avail, because they were *adjourned* Sessions, and the statute requires the notice to be given for the *General* Quarter Sessions for the *county*. I am of opinion that this rule must be discharged.

Bayley, J.—The appellant having neglected what he was bound to do, this Court cannot relieve him. The Sessions had no jurisdiction to receive the appeal until the notice was given.

Holroyd, J. and Littledale, J. concurred.

Rule discharged.

Monday, 22d Nov.

Inwood v. R. R. Mawley, C. Mawley, and S. Tress.

Where a latitat issued in 1823, returnable in *Trinity* Term against three defendants, one of whom was served with process before the return thereof, but the others were not brought into Court until *Easter*, 1824, of which Term an appearance was entered for all the defendants, and the plaintiff having neglected to declare before the end of the Term next following:—Held, that the defendants might sign judgment of non pros. under 13 *Car.* 2. st. 2. c. 2. s. 3.

On shewing cause against a rule nisi for setting aside the judgment of non pros. signed in this case, for irregularity, the facts disclosed on the affidavits were these:—On the 17th *June*, 1823, the plaintiff sued out a latitat against the defendants, returnable on the last day of *Trinity* Term. A copy of the writ was served on the defendant *Tress* on the 18th *June*, but not on the other defendants. An alias latitat was sued out on the 24th *November*, returnable on the last day of *Michaelmas* Term, and a copy thereof was served on the defendant *Robert Richard Mawley* on the 25th, but the

1824.

Inwood v. Mawley.

defendant *Charles Mawley* could not be served before the return. A pluries latitat was sued out on the 9th *February* last, returnable on the last day of *Hilary* Term, but *Charles Mawley* being still out of the way he could not be served before the return. On the 12th *February* another pluries writ was sued out against the defendants, returnable on the 19th *May*, in *Easter* Term, and on the 10th *May*, a copy thereof was served on *C. Mawley*. In *Easter* Term last, which ended on the 31st *May*, an appearance was entered for all the defendants. *Trinity* Term ended on the 7th *July*, and the plaintiff not having declared in that term, on the 9th *July*, the defendants signed judgment of non pros., and the question was whether, under these circumstances, the judgment was regularly signed.

E. Lawes shewed cause. The question in this case is whether the statute 13 *Car.* 2. stat. 2. c. 2. s. 3. applies to the present case. That statute enacts "that upon an appearance entered for the defendant by attorney, of the term wherein the *process is returnable*, unless the plaintiff shall put into the Court, from whence the process issued, his declaration against the defendant, before the end of the term next following, after appearance, a nonsuit for want of a declaration may be entered against him." Now it is clear that the plaintiff could not declare in this case, until *Easter* Term at the earliest, because, until that time, the defendants were not in Court, and no appearance could be entered until they were all served with the writ. It is true that the first writ was returnable in *Trinity* Term, 1823, but only one of the defendants could be served before the return of that writ; and it would have been of no use to enter an appearance for that defendant, because the plaintiff could not declare against him separately. The appearance mentioned in the statute must mean an *available* appearance, which could not have been entered until all the defendants were in Court. Here they were not all in Court until *Easter* Term, and the plaintiff not having declared "before the end of the

1824.
INWOOD
v.
MAWLEY.

term next following after appearance," the defendants were entitled to sign judgment of non pros.

Comyn, contrà. The judgment of non pros. has been irregularly signed. The statute 13 *Car*. 2. does not apply to this case. That statute requires that the appearance shall be entered *of the term* wherein the *process is returnable*. Now here the writ originally sued out, being joint, was returnable in *Trinity*, 1823, and therefore, no appearance having been entered as of that term, the non pros. was irregularly signed. It is clear that the statute does not apply to this case unless the appearance has been entered of the different terms of which the process is returnable. In *Holmes* v. *White* (a), cited in *Prigmore* v. *Bradley* (b), the master reported that a non pros. could never be signed unless bail were filed in the term in which the writ was returnable, and he said that though, in practice, judgments of the antecedent term were signed after the essoign day of the next term, yet they were always dated as of the day preceding the essoign day.

ABBOTT, C. J.—The appearance directed by the statute must mean an *available* appearance. Now here the defendants were not all served until *Easter* Term, and it would have been useless to enter an appearance until they were all in Court. The plaintiff could not declare until that term. He was bound to declare in *Trinity* Term, but having neglected to do so, I think the defendants were entitled to sign judgment of non pros. as soon as that term had elapsed.

BAYLEY, J.—The question is whether the words of the statute "the term wherein the process is returnable," apply to the first writ on which the action was brought, or to the ultimate writ, by which all the defendants are brought into Court. I think in fair construction they must apply to that

(a) E. 11 G. 3. Imp. Inst. Cler. K. B. 415. 4th Edit. Tit. Non Pros.
(b) 6 East, 314.

1824.
INWOOD v. MAWLEY.

writ by which the defendants are all brought before the Court, for otherwise the words would be inoperative in this case. It is true the first writ is returnable in *Trinity* Term, 1823, but only one defendant was brought in during that term, and it would have been useless to enter an appearance for him alone. In *Brandon* v. *Henry* (*a*) the defendant was arrested on a bill of *Middlesex*, on the 22d *November*, and special bail were put in in *Michaelmas* Term and perfected in *Hilary* Term, and judgment of non pros. being signed in *Hilary* vacation was held to be irregular, and the Court said that the plaintiff was guilty of no laches in not declaring in *Michaelmas* Term, as the defendant was not then fully in Court. So here the defendants were not all in Court until *Easter* Term last, and the plaintiff could not declare until *Trinity* Term. The judgment therefore being signed after *Trinity* Term, for want of a declaration in that term, it was perfectly regular.

HOLROYD, J. concurred (*b*).

Rule discharged with costs.

(*a*) 3 B. and A. 514.
(*b*) *Littledale*, J. was absent.

DAVIES, qui tam, *v.* BINT and others.

Monday, 22d Nov.

A qui tam information for penalties under the game laws is not an information within the meaning of the 48 *G.* 3. c. 58. so as to entitle the plaintiff to enter an appearance and plea, when the defendant himself neglects to appear and plead.

THIS was a qui tam information against four defendants for penalties on the 5 *Ann.* c. 14. for using engines to destroy game. At the trial before *Park*, J. at the last *Worcestershire* Assizes, a verdict was found against three of the defendants and the fourth was acquitted.

Curwood on a former day obtained a rule nisi for setting aside the verdict on the ground of irregularity. The alleged

1824. DAVIES v. BINT.

irrregularity was that the plaintiff had proceeded to trial before the cause was properly at issue, and before any notice of trial was given. On the 7th *May* last the plaintiff had served each of the defendants with a copy of the information, on which was indorsed a notice, "that unless, within eight days after the delivery thereof, he should cause an appearance and plea or demurrer to be entered in the Court of King's Bench to the information, an appearance and the plea of not guilty would be entered thereto in his name, pursuant to the statute in that case made and provided, and the issue to be joined thereon would be tried at the then next assizes to be holden in and for the county of *Worcester*." In consequence of the defendants neglecting to appear and plead according to this notice, the plaintiff entered an appearance and plea of not guilty for each, and took the record down to the assizes without any further notice of trial, and obtained a verdict as above mentioned. Now this proceeding seems to have been founded on the 48 *Geo.* 3. c. 58. under a supposition that that act extends to qui tam informations. But it is clear that the provisions of that act extend only to informations and indictments over which this Court has *exclusive* jurisdiction, and do not apply to informations on penal statutes, which are subject to the same rules and regulations as in other cases as to the plea and notice of trial. The whole proceeding in this case was irregular, and the verdict cannot be supported.

The Court having granted a rule nisi,

W. E. Taunton and *Russell* now shewed cause. The question is, whether this case comes within the operation of the 48 *Geo.* 3. c. 58., for if it does, it is clear that no other notice of trial was necessary than was indorsed on the copies of the information, and that, in default of the defendants appearing and pleading, it was competent to the plaintiff to enter an appearance and a plea of the general issue, and so bring the case to trial. That statute provides, "that

whenever any person shall be charged with any offence for which he may be prosecuted by indictment or information in his Majesty's Court of King's Bench, and the same shall be made appear to any Judge of the same Court, by affidavit, or by certificate, of an indictment or information being filed against such person in the said Court for such offence, it shall be lawful for such Judge to issue his warrant, &c.; and for want of bail to commit the defendant to the gaol of the county where the offence shall have been committed, or where he shall have been apprehended, until he shall have been acquitted of such offence, or in case of conviction shall have received judgment for the same." It then enables the prosecutor of such indictment or information to cause a copy thereof to be delivered to such person or to the gaoler, &c. with notice to plead in eight days, and to cause an appearance and a plea or demurrer to be entered in the said Court to such indictment or information, and then if he neglects to cause an appearance and a plea or demurrer to be entered to such indictment or information, the prosecutor is empowered to enter an appearance and a plea of not guilty for him. Now the question is, whether an information for penalties, for offences committed against the game laws, is an information within the meaning of this statute. It is clear that such an information comes within the words of the statute, because the words are, "indictment or *information*." These defendants are also charged with an *offence* which they have committed, and, therefore, the case comes within another term used in the statute. It is clear that by the 13 *Ric.* 2. c. 13. the offence with which these defendants are charged might have been prosecuted by indictment or information. By that statute, unqualified persons who shall use ferrets, heys, nets, and other engines for the destruction of game, are liable to one year's imprisonment. The only difference between that statute and the 5 *Ann.* c. 14. is, that in the latter, different and more extended provisions are introduced, but still both statutes, having the same object in view, must be taken together, and construed

1824. DAVIES v. BINT.

in pari materiâ. Most undoubtedly, in this particular case, the defendants might have been proceeded against upon the 13 *Ric.* 2. By the 5 *Ann.* c. 14. s. 4., persons using engines to destroy game, in default of paying the penalty thereby imposed, shall be sent to the house of correction for three months for the first offence, and four months for every other such offence. So that in both these statutes, the act which is to subject the party to penalty or punishment is called an *offence*. Again, the 8 *Geo.* 1. c. 14. speaks of *convictions, informations* and *prosecutions for offences* against the game laws. In 4 Bl. Com. 308. it is stated, "that such informations as are usually brought upon penal statutes, are informations partly at the suit of the king, and partly at that of a subject, which inflict a penalty upon conviction of the offender, one part to the use of the king, and another to the use of the informer, and are a sort of qui tam actions, only carried on by a criminal instead of a civil process." The same distinction is taken as to informations by Mr. Sergeant *Hawkins* in his Pleas of the Crown (*a*). In sect. 64. of that work it is said, that the king may totally bar the penalty by a pardon or a release precedent to the commencement of the suit; and again in sect. 67. it is said, that the plea is, not guilty, and, "if there be more than one defendant they ought not to plead jointly that they are not guilty, but severally that neither they nor any of them are guilty, &c." In all these statutes for preventing the destruction of game, the judgment always is, that the king or the informer shall recover, or that the defendant shall forfeit the sum mentioned by the particular statute. Here then are all the indicia necessary to bring this case within the terms, as well as the meaning of the statute 48 *Geo.* 3. c. 58. It is to be observed that the only offences excepted by that statute are felony and treason, and they are expressly excepted. The preamble recites that the provisions of the 26 *Geo.* 3. c. 77. and the 35 *Geo.* 3. c. 96., which were passed to amend the law with respect to the course of proceeding on indict-

(*a*) Curwood's Hawkins's P. C. lib. 2. c. 26.

ments and informations in the Court of King's Bench for offences against the revenue laws, and for offences against the quarantine laws, had been found beneficial, and that it was expedient to extend the same provisions to other cases. This then being an information for an offence committed against the game laws, the case comes within the terms as well as within the reason and principle of the statute, and consequently there was no irregularity in the proceedings.

Curwood and *Carrington*, contrà, were stopped by the Court.

ABBOTT, C. J.—I am clearly of opinion, that the 48 *Geo.* 3. does not extend to informations on penal statutes. The proceeding here is for penalties. It is not a *prosecution* by *indictment* or *information*, which are the words of the statute, and clearly mean prosecutions by indictment or information in his Majesty's Court of King's Bench, that is, in cases where this Court has an exclusive jurisdiction by indictment or information. Therefore, when the statute mentions offences, "which may be prosecuted by indictment or information in his Majesty's Court of King's Bench," those words cannot be extended to offences against penal statutes, which may be prosecuted in any other Court. By this statute a Judge of this Court may issue his warrant against the party, and for want of bail may commit him to the county gaol. But surely it never was thought, that this act would empower a Judge upon an information on a penal statute, to cause the defendant to give sureties for his appearance, and then for want of sureties, to issue his warrant and commit him until the result of the information should be ascertained. Such a power was never yet thought of as being vested in the Judges of this Court, and I know what the answer would be to such an application. Really the matter is too plain for argument.

BAYLEY, J.—I am of opinion that the 48 *Geo.* 3. applies

1824.

DAVIES v. BINT.

only to offences over which this Court has exclusive jurisdiction by indictment or information. It enacts in terms that "whenever any person shall be charged with any offence for which he may be prosecuted by indictment or information *in his Majesty's Court of King's Bench*, and the same shall be made appear, &c.:" that clearly imports offences over which this Court has exclusive jurisdiction by indictment or information at the instance of the king. Now this Court has not exclusive jurisdiction over informations on the game laws for penalties, because such informations may be brought in any of the Courts of *Westminster Hall*. The information in question might have been brought in any of the other Courts, and, therefore, the case does not come either within the terms or the spirit of the act of parliament.

HOLROYD, J.—I am of the same opinion. When the game laws speak of the *offence* and the *conviction*, they mean the *offences* and *convictions* therein described. Those words are not to be taken in the general sense in which they are applied to the cases mentioned in the statute in question. The same observation applies to the use of the words indictment or information. I never heard of an indictment in a case of this kind. It is perfectly clear that the 48 *Geo.* 3. has reference only to such offences as the King's Bench may exclusively entertain, when prosecuted by indictment or information at the suit of the king.

LITTLEDALE, J. concurred.

Rule absolute.



1824.

The KING v. The HULL DOCK COMPANY.

Friday, 26th Nov.

Where by a local act the guardians of the poor of the town of *Kingston upon Hull* were authorized to levy rates "by taxation of every inhabitant, and of all lands, houses, tithes impropriate, appropriation of tithes, and all *stocks and estates* in the said town, in equal proportions according to their respective worths and values:"— Held, that under this act, all personal property, including shipping, was rateable, whether the owners were or were not resident within the town.

If the ground of appeal against a poor's rate be, that certain rateable property has been altogether omitted, the onus does not lie upon the appellant to give the sessions the means of amending the rate, it being the duty of the parish officers to include all rateable property in the rate, and take what means they can to ascertain its value.

A landlord cannot be rated to the poor in respect of houses let to tenants, who have been excused their rates on the ground of poverty.

A rate upon the *Hull Dock Company* to the full amount of their profits, without regard to the amount of poor rates, with which they are chargeable, is bad.

THE Hull Dock Company having been rated to the relief of the poor of the town of *Kingston upon Hull*, in respect of their profits arising from dock dues and wharfage rates, the sessions on appeal amended the rate by inserting the names of certain persons therein, who had been improperly omitted; and the rate so amended was confirmed, subject to the opinion of this Court upon a case.

At the sessions it was not disputed that the rate was duly made, but it was insisted on the part of the appellants that certain persons whose names were mentioned in the case, ought to have been assessed in respect of property after mentioned, and that they had been improperly omitted from the rate, and also that a deduction ought to have been made from the sum upon which the Dock Company were assessed, in respect to the amount of the poor rate with which they were chargeable. By an act of the 9 and 10 *W.* 3. the poor of the parish of the *Holy Trinity* and *St. Mary*, which parishes comprehend the whole of the town of *Kingston upon Hull*, and the precinct of *Myton* adjoining and belonging thereto, are placed under the management of a corporation created by the act, and called by the name of "the governor, deputy governor, assistants, and guardians of the poor in the town of *Kingston upon Hull*." After empowering the said corporation to erect work-houses, &c. for the reception of poor and impotent persons, that statute proceeds to enact, "That it shall and may be lawful for the said corporation, from time to time, to set down and ascertain what

1824. The KING v. The HULL DOCK COMPANY.

weekly, monthly, or other sums shall be needful for the maintenance of the poor in the said hospital, or hospitals, workhouse, or workhouses, house, or houses of correction, or within the care of the said corporation, so that the same do not exceed what hath been paid in the said town towards the maintenance of the poor thereof in any one of the three last years, and so as such poor of the said respective parishes in the said town, as are unable to work, or get their living, be weekly provided for thereout; to the intent that no other levy or assessment may be made for any other maintenance or allowance to any of the poor of the said respective parishes, or any of them, upon the said inhabitants; and shall and may under their common seal certify the same unto the mayor, recorder, and aldermen of the said town for the time being. Which said mayor, and any six of the aldermen, or any eight of the aldermen without the mayor, may, and are hereby required, from time to time, to cause the same to be raised and levied by taxation *of every inhabitant, and of all lands, houses, tithes impropriate, appropriation of tithes, and all stocks and estates*, in the said town, and the lordship of *Myton* adjoining and belonging to the said town, in equal proportions according to their respective worths and values; and in order thereunto the said mayor and any six of the said aldermen, or any eight of the said aldermen without the mayor, shall have power, and are hereby required indifferently to proportion out the said sum and sums upon each parish and precinct within the said town, and by their warrants under the hands and seals of the major part of them to authorize and require the churchwardens and overseers of the poor of each respective parish and precinct to assess the same respectively, and after such assessments made and returned, the said mayor and six aldermen, or any eight of the aldermen without the mayor, are hereby empowered to approve, confirm, or alter such assessments, as to them shall seem just and reasonable, and the said assessments by warrants under their hands and seals to authorize the said churchwardens and overseers to demand, gather, and re-

ceive." By virtue of this statute, in the month of *July*, 1823, the mayor and aldermen issued their warrants to the proper officers of the several wards into which the town of *Hull* is divided, and also of the precincts of *Myton*, authorizing and requiring them to make assessments within their respective wards and precincts upon every inhabitant, and upon all lands, houses, tithes impropriate, appropriation of tithes, and all *stocks and estates* within the same. The Hull Dock Company having been assessed under the authority of these warrants, appealed against the assessments, on the ground that certain classes of persons who ought to have been rated had been omitted, namely, first, persons who did not reside in *Hull*, but had either shops or counting-houses there, and having stocks in trade, of which a clear profit had been made during the preceding year; second, a lessee of houses who underlet the same at an improved rent, the occupiers of which had been rated, but excused from payment of the rates on the ground of poverty; third, owners and part owners of ships registered in the port of *Hull*, which usually traded to and from the port, and were within the town at the time when the rate was made. Some of these owners and part owners of ships resided within the town and others did not, but had counting-houses there, and others were neither resident nor did they occupy counting-houses in the town. It was stated, however, that the ships had made several voyages from and to *Hull* during the preceding year, and that the owners made a profit thereof respectively, but the particular amounts of such profits were not stated. And fourth, persons who had stock in trade deriving profit therefrom and residing in the ward for which the rate was made. It being admitted by the respondents at the hearing of the appeal that these last mentioned persons ought to have been included in the rate, the sessions ordered the rate to be amended, by inserting the names of those persons therein; but they reserved for the opinion of this Court the question, whether the three classes of persons above mentioned ought to have been included in the assessment. The

1824.

The King v. The Hull Dock Company.

appellants had been assessed in respect of the profits arising from the dock dues and wharfage rates received by them. The case stated, that their net profits for the year amounted to 8900*l.* after making a fair allowance in respect of repairs and all other expenses incidental to, and necessary for making the property profitable, but without making any deduction in respect of the sum with which they were chargeable to the poor rate, and which according to the assessment in question amounted to 2225*l.* If the amount with which they were so chargeable as poor rate ought to have been deducted, then their net profits would amount only to 6675*l.* or thereabouts. The Dock Company were assessed as upon profits amounting to 8900*l.* and not as upon profits amounting to 6675*l.* only, no deduction being allowed in respect of the poor's rate. The question for the opinion of the Court is, whether under the circumstances set forth in the case, the order of sessions can be supported.

Marryat and *Coltman* in support of the order of sessions. The question is whether the 9 and 10 *W.* 3. by which the management of the poor of *Hull* is regulated, is to receive a different construction from the 43 *Eliz.* c. 2. It is true, that there is some variation in the language of the former from the latter, but still as both were made in pari materiâ it is submitted that they ought to receive the same construction. If that be so, then it is clear, first, that the owners of personal property not resident within the town of *Hull* are not rateable. In Sir *Anthony Earby's* case (*a*) it was held so early as the 9 *Car.* 1. that the owners of personal property are not rateable under the 43 *Eliz.* unless they are resident within the parish where the property lies, and that construction of the statute has never since been disputed. Two things are requisite to make personal property rateable, first, that the owner must be resident in the parish, and second, that the property must produce a profit, and if either of these circumstances is wanting the rate will

(*a*) 2 Bulst. 354.

be bad. It must be conceded that the words "stocks and estates" in the 8 and 9 *W.* 3. mean personal property; but inasmuch as the owners of the stocks in trade mentioned in the case were not resident in *Hull*, the persons comprised in that class were properly omitted from the rate. Then as to the second class there is no pretence for rating the lessee of houses on the ground of the inability of his tenants to pay the rates. The rate is in all cases imposed upon the actual occupier of the property, and it was never yet heard of, that a landlord was liable to pay the poor's rates because of the poverty of his tenant. The landlord can in no sense be considered as the occupier within the meaning of the statute of *Elizabeth*, so long as there is a tenant in possession. There is nothing in the 9 and 10 *W.* 3. to vary that universal rule of law, and according to Sir *Anthony Earby's* case, the occupier, and not the landlord, is to be rated. Then as to the third class of persons alleged to have been improperly omitted from the rate, it must be admitted that ships are rateable property (*a*), but in this case, though some of the owners and part owners are stated to be resident in the town of *Hull*, yet there is nothing to shew that those persons derive any profit from property of that description. There is no statement in the case as to what shares belonged to the resident part owners, and on the other hand, the case does state that the amount of their profits was not shewn. According to the cases of *Rex* v. *Topham* (*b*), and *Rex* v. *Ringswood* (*c*), it was incumbent on the appellants, not only to shew that rateable property was omitted, but also the amount at which it should have been rated. Undoubtedly it was the duty of the sessions to amend the rate if it was improperly made, but if the appellant does not furnish them with data upon which the amendment is to take place, no obligation of that kind is imposed. Here the appellants produced no evidence to shew what profits arose from the property which was alleged to have been improperly omitted from the rate, and

(*a*) *Rex* v. *White*, 4 T. R. 771.
(*b*) 12 East, 546.
(*c*) Cowp. 326.

1824.

The King v. The Hull Dock Company.

consequently the sessions could do no more than they have done (*a*). Then lastly, there is no objection to the amount at which the Dock Company have been rated. Their net profits for the year are stated to have amounted to 8900*l.* and upon that sum they were clearly rateable without any deduction in respect of the sum with which they are chargeable to the poor rate. They are assessed upon their profits, and according to the amount of those profits, they are rateable. This was the principle acted upon in *Rowls* v. *Gell* (*b*) and *Rex* v. *Agar* (*c*), and in those cases no claim was allowed in respect of the poor rate for which the defendants were respectively rated. On these grounds the order of sessions must be confirmed.

Scarlett, Tindal, and *Archbold,* contrà. The statute 9 and 10 *W.* 3. cannot be construed in pari materiâ with the 43 *Eliz.* c. 2. unless the preamble of the former discloses something expressive of such an intention on the part of the legislature. Now no such intention is expressed. The 9 and 10 *W.* 3. therefore must receive a construction conform able to its own peculiar language, as applicable to the regulation and management of the poor of this particular town. The language of the two statutes is mainly distinguishable. In the statute of *Elizabeth* there is no mention made of personal property, whereas in 9 and 10 *W.* 3. "*stocks and estates*" are expressly mentioned in terms. It is not disputed that under the statute of *Elizabeth*, personal property is not rateable, unless the party is personally resident in the parish where it lies; but in this case the statute of *William* says nothing about inhabitancy or residence, and in express terms makes personal property rateable. The rates are to be levied by taxation of "every inhabitant, and of all lands, tithes impropriate, appropriation of tithes, and *all stocks and estates* in the said town, &c." Therefore personal property is equally rateable whether the person resides in the town or

(*a*) *Rex* v. *Ambleside*, 12 East, 546.
(*b*) Cowp. 451.
(*c*) 14 East, 256.

out of it. The only question is whether the property does or does not yield a profit to the owner. In the construction of this statute his residence is quite out of the question. Suppose a person derives a profit of 10,000*l.* a year from his stock in trade in the town of *Hull*, could he relieve himself from liability to the rate on the ground that he did not personally reside in the town? Surely not. Therefore upon the just exposition of this statute it is clear that the owners of stocks in the town are rateable whether they be or be not resident. [*Abbott*, C. J. We are all of opinion that we must construe this local act of parliament by itself. It may very possibly have happened that when an act of parliament was passed which was to legislate for this particular town of *Hull*, the legislature would take into consideration the circumstances of the place, the nature of the occupation, and the description of the inhabitants, and would adapt their language accordingly, so as to make property rateable in that particular town, which would not be rateable by the general law of the land.] Then as to the second class of cases, there seems no good reason why the landlord of the houses should not be rated if the tenants are from their poverty excused. If the landlord by the rent he demands absorbs the tenant's means of paying the rate, it seems but just and equitable, that he should contribute to the burthens of the parish in common with other parishioners. The practice of letting houses to poor tenants has a natural tendency to increase pauperism, and throw an unequal burthen upon those persons who are enabled to pay their rates. If, therefore, a landlord thinks proper to let his houses to a class of persons who are only able to pay his rent, it is fit that he should be made liable to pay those rates which his tenants might be able to pay but for the amount of rent demanded. [*Abbott*, C. J. If the principle is established, that landlords are liable to be rated in consequence of the inability of their tenants to pay rates, it will have the effect of depriving poor persons of their habitations, for no landlord will let small tenements to persons of that description, if they are to be liable as sure-

1824.

The King v. The Hull Dock Company.

ties for their tenants. That will be the result, if such a principle were established.] It certainly seems reasonable that both landlord and tenant should be included in the rate, although there may be a difficulty in establishing the liability of the landlord. Then with respect to the objection that the owners of ships have not been included in the rate, that has received no satisfactory answer. It may not be a very easy matter, perhaps, to ascertain the amount of profit arising from such property, but that is no reason for omitting the ship owners altogether. If it appeared that such persons had been omitted improperly, the sessions ought to have quashed the rate and were certainly not bound to amend it. It is said on the other side, that the onus lies upon the appellant to furnish the sessions with the materials for amending the rate in this particular. It would however be a most unreasonable as well as impracticable duty imposed upon the appellants if they were required to prove at how much each of a very large class of persons ought to have been rated. With respect to the deduction claimed by the Dock Company in respect of the sum at which their net profits is rated, it is perfectly clear that the Company have been rated too high. The criterion of their rateability is the sum which the docks would bring them if they were let to a tenant. Now the annual value of land is made up of the rent and the outgoings, of which the poor rate forms a considerable proportion, and it is the universal practice not to rate land at the rack rent but according to the rent, minus the poor rate. Upon this principle therefore, the profits of these docks can only be rated upon the net profits after deducting the poor rate.

Cur. adv. vult.

On this day the judgment of the Court was delivered by

Abbott, C. J.—This was an appeal against a rate upon the *Hull* Dock Company for the relief of the poor of the parishes of the *Holy Trinity* and *St. Mary*, and the pre-

cinct of *Myton*, adjoining and belonging to the town of *Hull*. The grounds of appeal were that some persons were improperly omitted, and that a deduction should have been made from the sum at which the Company were rated, to the extent of the poor rate they were compellable to pay. The poor rate in *Hull* is raised under an act of the 9 and 10 *W*. 3. which directs that it shall be levied "by taxation of every inhabitant, and of all lands, houses, tithes impropriate, appropriations of tithes, and all stocks and estates, according to their respective worths and values." The cases of persons improperly omitted were reduced to certain classes, namely, first, persons residing out of *Hull* but occupying counting-houses or shops within the town of *Hull*, and having stock in trade by which they made a specified profit; secondly, owners or part owners of ships registered at the port of *Hull*, and trading to and from it, and making profit yearly, though the amounts of such profit did not appear, such owners being in some instances resident in *Hull*, and in others non-resident; and thirdly, a lessee of houses, underlet by him at an advanced rent to persons who were rated, but on account of their poverty were excused from paying their rates; and if any one of these three classes was improperly omitted the rate was wrong pro tanto. The rate had originally omitted certain other persons resident in *Hull*, and having stock in trade there yielding profit; but it was conceded at the sessions that those persons ought to be added to the rate, and they were added accordingly. The case therefore is confined to the three sets of cases I have mentioned, which were omitted, and we are of opinion that the first and second classes were liable to be rated and were improperly omitted, but that the lessee in the third case was not liable, and that the omission as to him was perfectly correct. It was urged upon the argument that although the local act 9 and 10 *W*. 3. used different language from the 43 *Eliz*. c. 2. yet that it ought to be construed as if the language in both had been the same, but we intimated our opinion to the contrary in the progress of the discussion, and

1824.

The KING v. The HULL DOCK COMPANY.

we see no reason upon further consideration for changing that opinion. The 43 *Eliz.* c. 2. uses language applicable to the kingdom in general. The 9 and 10 *W.* 3. having in its view the town of *Hull* only, would naturally suit its expressions to the state and circumstances of that place, and when we find a deviation from the language used in the statute of *Elizabeth*, the presumption is, that the deviation was intended, and that a different system was thought better for *Hull*, and that the language proper for such system was consequently used. We are therefore to consider it as the intention of the legislature in passing the 9 and 10 *W.* 3. that the rate should be raised by taxation of every inhabitant, and of all lands, houses, tithes impropriate, appropriations of tithes, and all stocks and estates within the town. It was properly admitted by Mr. *Coltman* in argument, that stocks and estates must include all stock in trade and personal property. Indeed the word "stocks" could have no other meaning, and "estates" placed as it is in the clause must extend to personal estates. This statute therefore has these two effective words which are not to be found in the statute of *Elizabeth*, and these two words remove from this case all distinction between residents and non-residents. Under the statute of *Elizabeth*, there was no word applicable to personal property, and it was only on the ground of his being an inhabitant that any owner of personal property could be rated for that property, because there was no word in that statute to include him, except the word "inhabitant." Upon the construction of that statute therefore there was necessarily a distinction between a resident and non-resident, because the resident would be rateable for his personal property within the place, whereas the non-resident would not. The distinction however under that statute applied only to those kinds of property which the statute did not specify, for the occupiers of lands, houses, &c. and whatever the statute enumerated, were rateable, whether resident or not. In the 9 and 10 *W.* 3. what was defective in this respect in the statute of *Elizabeth* is supplied. The rate is not only to be

1824.
The King v. The Hull Dock Company.

upon every inhabitant, but upon all stocks and estates. Lands, houses, and tithes are all rateable according to the general principles of rating, whether the occupier be resident or not, and it is impossible upon this act to say that lands within the town shall be rated, but that stocks and personal property shall not. The stocks and personal property are not rateable elsewhere, but as they have all the benefit of the town, there can be no reason why, when there are words sufficient to include them, they should not be included. We are therefore of opinion that the stock in trade and ships yielding profit are liable to be rated. It was pressed upon us in argument that as the appellants had not made out what was each ship's profit, they had not given to the sessions the means of amending the rate, and that the appeal therefore as to the ships could not be supported; but besides that this is evading the question which was obviously sent for the opinion of the Court, it is founded upon a misapprehension of the duties of the parish officers, and of an appellant. Where property is rateable, it is the duty of the officers to include it in the rate, and to take what means they can to ascertain its value. It is not for them to omit it altogether and to cast upon the appellant what is properly their duty, the burthen of proving its value. In the case of a single omission the difficulty upon the appellant might not be very great, but where all the property of a given description is omitted, the difficulty might be excessive. Before the passing of the 41 *Geo.* 3. c. 23. the omission of a single individual who ought to have been included, compelled the sessions to quash the whole rate, and so as he was rateable at all, the extent to which he was rateable did not come in question. That statute however requires the sessions to amend or alter a rate appealed against without quashing it, but with this proviso, that if the sessions shall think it necessary for the purpose of giving relief to the appellant to quash the rate, they may do so, and when any rate contains so many omissions that it can hardly be expected of an appellant that he should have evidence to shew the extent to

1824.

The King v. The Hull Dock Company.

which each person omitted ought to be rated, and where the investigation before the sessions would be likely to exhaust more time than they could reasonably be required to give up, we think it would not be an improper exercise of their discretion to quash the rate, and make the officers of the parish do in the end what they ought to have done at the beginning. As to the question of the lessee whose under tenants have been excused from poverty, the point was not very much pressed upon our consideration in the argument, and we think the lessee not liable. The 9 and 10 *W. 3.* imposes the rate indeed upon the lands, houses, &c. without mentioning either occupier or owner, but as this is a burthen commonly falling on the occupier, and rarely imposed upon the owner, we think the owner not compellable to bear it. The owner fixes his rent upon the supposition that this is his tenant's burthen, and without very clear words to shew that such was the intention, we think we cannot make the landlord surety for the tenant. As to the question whether the rate upon the company should be according to the full amount of their profits without making any deduction for the sum they are liable to pay for poor rate, we think the rate ought not to be so made. This property is to be charged according to its worth and value, in like manner and in the same proportion as other real property is charged in the same rate. If other real property is charged only at three fourths, or any part of its value, after making deductions of the same nature which have been made in the case of the company, the company ought to be charged in the same proportion. If other real property is charged according to the rack rent actually paid by the occupier, and according to a rent so estimated where the occupier is not a tenant, at such rent there will even in those cases be a virtual allowance in respect of the poor rate, such a rent being in reality a part only of the worth or value of the land. The whole worth or value is made up of what is paid in rent, and what in rates and other outgoings. Land intrinsically worth forty pounds a year can only pay a rent of thirty pounds, if it is

to pay 10*l.* per annum in other ways; and in estimating a rent, both landlord and tenant look to the value of the thing on the one hand, and to the outgoings on the other, and the outgoings must be deducted from the value before the rent can properly be fixed. Whenever, therefore, the rate is according to the rent, which is generally the case, an allowance is virtually made for the poor rate; and if this rate is made according to the rent, the company should have that allowance. The mode of estimating the allowance is a very different thing. That which is suggested in the case is clearly wrong, for if 2225*l.*, the present rate, is deducted from the 8900*l.*, the rate upon 6675*l.* only will have part of the rateable proportion of 8900*l.* free from rate. The allowance must be so made that the sum upon which the annual rates are made may with the amount of the rates make up the 8900*l.* This sum, according to the present rate, will be 7120*l.* and the sum to be paid by the company will be 1780*l.* The process of calculation must be adapted to the amount of the rate. It is sufficient for us to propound the rule, leaving the process of calculation to others. Upon the whole, therefore, all the persons omitted, except the lessee of houses underlet by him, must be put upon the rate; the rate payable by the Dock Company must be reduced to 1780*l.* and the case must be sent down to the sessions, that they may introduce the proper sums if they find it practicable, or that they may quash the rate if it be not.

1824.

The King v. The Hull Dock Company.

Order of sessions quashed.

C. Fleming *v.* J. Davis and others.

Friday, November 26.

Where plaintiff sued defendants in a superior court for a demand above 5*l.*, and upon judgment by default the jury reduced the damages to 5*l.*, and it appeared that the defendants, at the time of action brought, resided within the jurisdiction of the *London* Court of Requests, and might have been sued under the 39 and 40 *Geo.* 3. c. 104, the Court stayed the proceedings upon payment of the damages, without costs.

THE plaintiff brought assumpsit to recover 6*l.* 9*s.* 0¼*d.*, being the balance of an original demand of 17*l.* 16*s.* 0¼*d.*, for

1824.

FLEMING v. DAVIS.

work and labour as a cabinet-maker. The defendants suffered judgment by default; and upon the execution of a writ of inquiry before the sheriff, the plaintiff's demand was reduced to *5l.*, by proof, on the part of the defendant, that the work had been overcharged. The jury accordingly found a verdict for the plaintiff, damages *5l.*

Comyn, on a former day, moved for a rule nisi to stay the proceedings, upon payment of the damages, without costs, under the *London* Court of Requests Act, 39 and 40 *Geo.* 3. c. 104., on a suggestion that at the time of action brought, the defendants were seeking their livelihood within the city of *London*, so as to bring them within the jurisdiction of the *London* Court of Requests. It appeared from the affidavits, that the defendants, who are partners in the cabinet-making business, occupied a house and premises in *Bartholomew Close*, within the city of *London*, where they carried on a part of their business, but did not reside there; and that they had also premises of the same description in the *Borough* of *Southwark*, where the bulk of their business was carried on.

E. Lawes shewed cause against the rule, and contended, first, that the affidavits for the defendants did not sufficiently shew that they resided, or kept any place of business, within the city or liberties of *London*, so as to entitle them to be sued in the Court of Requests; and second, that at all events this was not a case within the operation of the *London* Court of Requests Act; and he referred to *Harsant* v. *Larkin*,(*a*) which arose upon the *Rochester* Court of Requests Act, where it was held, that if the plaintiff has *reasonable cause* for litigating his demand in a superior court, he shall not be deprived of his costs, even though the jury shall find a verdict for less than the sum demanded, so as to bring the amount within the sum limited by the Requests Act. Now here it was quite clear that the plaintiff had a right to sue the defendants, upon the balance of ac-

(*a*) 7 J. B. Moore, 68; S. C. 3 B. and B. 257.

counts, for 6*l.* 9*s.* 0¼*d.*, and the circumstance of the defendants having been enabled to reduce the demand by evidence of supposed overcharges, ought not to deprive the plaintiff of his costs, when he had originally reasonable cause for insisting upon a larger demand.

1824. FLEMING *v.* DAVIS.

Comyn, contrà, was stopped by the Court.

ABBOTT, C. J.—It being sworn by the defendants, and not denied on the other side, that at the time this action was brought, they occupied a house and premises, carried on their business, and sought their livelihood, within the jurisdiction of the *London* Court of Requests Act, I think there is enough to bring the case within the operation of the statute, if the other point is made out. Now by the 39 and 40 *Geo.* 3. c. 104. s. 12, it is enacted, "that if any action or suit shall be commenced in any other Court than the said Court of Requests, for any debt not exceeding the sum of 5*l.*, and recoverable by virtue of this act, in the said Court of Requests, the plaintiff in such action or suit shall not, by reason of a verdict for him, have or be entitled to any costs whatsoever." The question before the jury in this case was, how much was due to the plaintiff? They have found that 5*l.* only was due to him, and therefore I think we must say that this action was commenced in the superior court, within the meaning of the 12th section of the statute, as an action for a debt not exceeding the sum of 5*l.*, and consequently the plaintiff is not entitled to his costs. It would be very inconvenient in the construction of this act of parliament, if we were to allow of any discussion upon affidavit as to the reasonableness of the plaintiff's original demand, when it is found by the jury that the plaintiff was only entitled to recover 5*l.*

BAYLEY, J.—I am of the same opinion. In *Bateman* v. *Smith*(*a*), where the question arose upon the *Middlesex*

(*a*) 14 East, 301. Vide Tidd, 990, et seq. 8 East, 336. 2 Taunt. 196. Ante, vol. iii. 51.

1824. FLEMING v. DAVIS.

Court of Requests Act, and the jury found for the plaintiff damages 1*l.* 13*s.*, after having claimed 3*l.* 15*s.* 4*d.*, Lord *Ellenborough* said, that "it was assuming the whole question here, to say that the original debt was above 40*s.*; for the jury had found the damages to be under 40*s.*; which entitles the defendant to recover double costs by the very words of the act under consideration." I think also, in this case, we are bound to hold that the jury having by their verdict found that the plaintiff is entitled to no more than 5*l.* the case comes within the *London* Court of Requests Act.

HOLROYD, J. and LITTLEDALE, J. were of the same opinion.

Rule absolute.

Friday, November 26.

VAN WART *v.* WOOLLEY, LEWIS, MOILLIET, and GORDON.

A. residing at *New York* having ordered goods of *B.* residing at *Birmingham*, sent to *B.* on account of the goods a bill drawn by *C.* in *New York*, upon *D.* in *London*, payable to the order of *B.*, but not indorsed by *A.* *B.*, through his bankers, presented the bill for acceptance to *D.* who refused to accept, but no notice of the non-acceptance was given until the day of payment, when the bill was presented for payment and dishonoured. *C.*, the drawer, became bankrupt before the bill reached *B.'s* hands, and *never* had any funds in the hands of *D.*, the drawee, to meet the bill. In assumpsit by *B.* against his bankers for neglecting to give notice of the non-acceptance:—Held, that *A.* not having indorsed the bill, was not entitled to notice of dishonour, and remained liable to *B.* for the amount of the goods; that *C.* the drawer, never having had any funds in the hands of *D.* the drawee, was likewise not entitled to notice; and, therefore, that *B.* could not recover the full amount of the bill, but only such damages as he had sustained by being delayed in pursuit of his remedy against the drawer.

THIS was an action of assumpsit against the defendants, as the bankers and agents of the plaintiff, for neglecting to give due notice of the non-acceptance of a bill of exchange, which the plaintiff had delivered to them to get accepted; in consequence of which laches the plaintiff alleged, that, as the payee, he was prevented from giving due notice of the dishonour to the drawers, *Alexander Cranston* and Co., and also to *Irving*, *Smith*, and *Holly*, who had delivered the bill to the plaintiff in payment of a debt due from them to him; and whereby the plaintiff also alleged that he had lost his

remedy against the drawers and the said *Irving*, *Smith*, and *Holly*. The defendants pleaded the general issue, on which issue was joined. At the trial before *Abbott*, C. J. at the *London* Adjourned Sittings after *Michaelmas* Term, 1823, a verdict was found for the plaintiff, subject to the opinion of the Court upon the following case:—

The plaintiff, residing at *Birmingham*, received from his correspondents, *Irving*, *Smith*, and *Holly*, of *New York*, in *America*, a bill of exchange for 500*l*., drawn by *Alexander Cranston* and Co. upon *Grey*, *Lindsay*, and Co. of *London*, dated *New York*, 6th *June*, 1818, at sixty days' sight, payable to the order of the plaintiff, and inclosed in a letter describing the bill as "a further remittance on account of our order for hardware." On the 2d *July*, 1818, the plaintiff delivered the bill to the defendants, who are bankers at *Birmingham*, to get it accepted by the drawees resident in *London*, and the defendants received it for that purpose and forwarded it on the following day to their town correspondents, *Lubbock* and Co. bankers in *London*, who on the 8th *July* presented it to the drawees for acceptance. The drawees, having on the 1st *July* received from *Cranston* and Co. advice of the bill being drawn, had written for directions as to accepting it to *Alexander* and Co. of *Belfast*, in *Ireland*, and not having received any reply from those parties, gave the following answer to *Lubbock* and Co.; "*Greg* and Co. have written for advice: will thank *Lubbock* and Co. to have it only noted for the present;" and in consequence of such request *Lubbock* and Co. did not protest the bill for non-acceptance, or give notice to the defendants, or the plaintiff, of the refusal to accept, until by letter sent by post on the 10th *September*, 1818, and received by the defendants on the 11th, the bill having been presented for payment on the 9th, and protested on that day for non-payment; and the defendants did not give any notice to the plaintiff of the refusal of the drawees to accept the bill until the 11th *September*, 1818, being the day the defendants received the bill from *Lubbock* and Co. This was the first notice to the

1824.

VAN WART v. WOOLLEY.

plaintiff of such dishonour, and such notice was accompanied with a protest in the usual form. The defendants were some time before, and at the time when the bill was delivered to them, the general bankers of the plaintiff, and invariably charged him commission on all the transactions which passed between him and them as his bankers, and did actually charge the plaintiff, in their banking account with him, commission on the bill at the rate of six shillings per cent. and they further charged him with the sum of 1*l.* 10*s.* the amount paid for noting, for non-acceptance and protesting the same for non-payment and charges; as appears by the plaintiff's pass-book with the defendants, to which either party is at liberty to refer. On the 9th *September*, 1818, the bill was presented to the drawees for payment, and dishonoured. The drawees had no funds or effects of the drawers in their hands at the time the bill was originally drawn, nor at any time prior to its coming to maturity, nor had they any expectation of assets of the drawers, to meet the bill; but the drawees had been accustomed to accept for the drawers, under the guaranty of *Alexander* and Co. of *Belfast*, for 10,000*l.* which amount had been overdrawn. The drawers had, before the bill was drawn, been accustomed to draw upon the drawees to a larger amount than the 10,000*l.* but the drawees had never accepted any bills beyond the guaranty of 10,000*l.* unless they were covered by other resources. The drawees had, by letter of the 3d *July*, 1818, addressed to the drawers, declined accepting the bill, unless they should receive further advice from *Alexander* and Co. *Cranston* and Co. the drawers, became bankrupts in *New York*, on the 6th *July*, 1818, and the produce of their estate will be about two shillings in the pound. It appeared that *Irving*, *Smith*, and *Holly* employed the plaintiff to purchase goods for them in *England* by commission, and had ordered goods to a much larger amount than the bill, which goods were sent out by the plaintiff to *America*; the bill having been remitted by *Irving*, *Smith*, and *Holly* to the plaintiff, for and on account and in part payment of the price of the goods. *Irving*,

Smith, and *Holly* did not indorse the bill, and were wholly unknown to the defendants. On the 12th *September*, 1818, the plaintiff sent the bill to *Irving*, *Smith*, and *Holly*, requesting them to pay the amount; but on the 9th *March*, 1819, they wrote to the plaintiff, and refused so to do, returning the bill, and insisting that they were discharged from liability to make such payment, in consequence of their not having had due notice of the non-acceptance of the bill; whereupon the plaintiff, on the 1st *April*, 1819, returned the bill to the defendants, who refused to pay the same. The usual time of passage from *England* to *New York* and back, is generally about ten weeks. The question for the opinion of the Court is, whether the plaintiff, under the circumstances, is entitled to recover. If he be, then a verdict to be entered for the plaintiff, for the sum of 637*l*. 15*s*.; if not, then a nonsuit to be entered.

This case was twice argued, by *Chitty* for the plaintiff, and *Abraham* for the defendants; first at the sittings in banc after last *Easter* Term, and again at the sittings in banc before the present term.

Arguments for the plaintiff. The defendants were agents, receiving a remuneration for their services, and were therefore liable for any damage occasioned by their neglect. A damage was so occasioned, for through their neglecting to give notice of the non-acceptance, the plaintiff experienced a difficulty in obtaining payment of the bill. The plaintiff was clearly entitled to a remedy on the bill, either against the drawer, or the party from whom he received it, and the laches of the defendants has thrown a difficulty in the way of his pursuing that remedy. It is not by any means certain that the drawers have not been discharged, and the plaintiff has certainly lost his remedy against *Irving* and Co. It was held in *Owenson* v. *Morse* (*a*), that if the seller of goods take notes

(*a*) 7 T. R. 64.

1824.

VAN WART v. WOOLLEY.

or bills for them, without agreeing to run the risk of the notes being paid, and the notes turn out to be worth nothing, this will not be considered as payment. So that the plaintiff originally had a remedy against *Irving* and Co. which he has now lost, because they were entitled to notice of the non-acceptance, and he having been prevented by the defendants from giving that notice, has, as between him and *Irving* and Co. made the bill his own, and discharged them. They stood in the situation of a surety or guarantee, and it was decided in *Phillips* v. *Astling* (*a*) that upon a guaranty given of the price of goods to be paid by a bill, due notice of the non-payment must be given both to the drawer and the guarantee.

Arguments for the defendants. The plaintiff has sustained no damage from not having received notice of the non-acceptance, therefore he cannot maintain this action. By the general rule of law the drawer is primâ facie entitled to notice, because generally speaking the want of it would be prejudicial to him; but where, from the particular circumstances of the case, he sustains no damage from the want of notice, there it is unnecessary. In this case the drawer never had any funds in the hands of the drawee to meet the bill, nor had the drawee ever any expectation of receiving assets for that purpose; consequently notice to the drawer was not necessary, and he was not discharged for want of it. Neither were *Irving* and Co. entitled to notice under the circumstances of this case, because they had not indorsed the bill, and it has been more than once held that a person who pays away a bill without indorsing it, cannot be sued upon it, and therefore is not entitled to notice of its dishonour. *Swinyard* v. *Bowes* (*b*), and *Holborow* v. *Wilkins* (*c*). For the same reasons it follows that *Irving* and Co. are still liable to the plaintiff for the amount of the bill; *Ex-parte Blackburne* (*d*); the latter consequently has lost none of his

(*a*) 2 Taunt. 206.
(*b*) 5 M. and S. 62.
(*c*) Ante, vol. ii. 59.
(*d*) 10 Ves. 204.

remedies; he has sustained no damage, and has no right to cast any liability upon the defendants.

The Court took time to consider of their judgment, which was now delivered by

ABBOTT, C. J. who, after stating the pleadings and the facts of the case, thus proceeded.—Upon this state of facts it is evident that the defendants, who, it cannot be denied, are identified with and answerable for their *London* correspondents, *Lubbock* and Co., have been guilty of neglect of that duty which they owed to the plaintiff, their employer, and from whom they received a pecuniary reward for their services. The plaintiff, therefore, is entitled to maintain an action against them to the extent of any damage he may have sustained by their neglect. He charges a damage in two respects; first, for his loss of remedy against *Irving* and Co. from whom he received the bill; and second, for his loss of remedy against *Cranston* and Co. who were the drawers of the bill. If the plaintiff, as between himself and *Irving* and Co. has made the bill his own, and cannot call upon them for the amount, his damage will be to the full amount for which the verdict has been obtained. If he still retains his remedy against them, and has only been delayed in his pursuit of the same remedy as he would have had against the drawers; the amount of his loss has not been inquired into or ascertained, and is probably much less than the amount of the bill. We are of opinion that the plaintiff has not, as between himself and *Irving* and Co. made the bill his own. We think he might, notwithstanding the want of notice of non-acceptance, have recovered from them the amount of the bill in an action for money paid; or, if he had notice of dishonour before he bought and sent the goods which they had ordered, he might have returned the bill, and abstained from buying or sending the goods. It will have been observed that *Irving* and Co. sent the bill to the plaintiff without any indorsement by them, and payable

1824.
VAN WART
v.
WOOLLEY.

to his own order. The learned counsel for the plaintiff was under the necessity of arguing this case as if he were arguing on behalf of *Irving* and Co. in an action brought against them by the plaintiff, and he contended that *Irving* and Co. were entitled to notice of non-acceptance in this case, as they would have been by the law of merchants in the case of a bill indorsed by them to the plaintiff. But no authority was produced which supports such a proposition, and the case of *Swinyard* v. *Bowes* (a) is an authority the other way. If a person delivers a bill of exchange to another, without indorsing his own name upon it, he does not subject himself to the obligations of the law of merchants; he cannot be sued upon such a bill, either by the person to whom he delivers it, or by any other. Then, as he does not subject himself to the obligations, he is not entitled to the advantages. If the holder of a bill sells it without his own indorsement, he is, generally speaking, liable to no action in respect of it. If he delivers it, without his own indorsement, for any other consideration, antecedent or concomitant, the exact nature of the transaction, and all the circumstances connected with the bill, must be inquired into, in order to ascertain whether he is subject to any responsibility. If the bill is delivered and received as an absolute discharge, he cannot be liable; if otherwise, he may. The mere fact of receiving such a bill does not prove that it was received as a discharge; that was decided in the case of *Bishop* v. *Rowe* (b), and in the case of *Swinyard* v. *Bowes*, already mentioned. Then what are the facts of the present case? *Irving* and Co., who resided in *America*, had employed the plaintiff, who resided in *Birmingham*, to purchase goods for them in *England* by commission. By accepting this employment he became, as between himself and them, their agent. The bill is drawn upon persons resident in *London*; the plaintiff, therefore, could not be expected to present the bill himself; it must have been understood that he was to do that through the medium of some other person. For

(a) 5 M. & S. 62. (b) 3 M. & S. 362.

1824.

VAN WART *v.* WOOLLEY.

that purpose he employed persons in the habit of transacting such business for him and others, and upon whose punctuality he could reasonably rely. In doing this, he did all that it was incumbent on him to do as between himself and *Irving* and Co., and therefore as he is personally in no default as to them, he is not answerable to them for the default of the persons whom he employed under such circumstances. In the course of the argument the situation of *Irving* and Co. was compared to that of a guarantee. The decisions that have taken place on actions brought against guarantees warrant the proposition before mentioned, namely, that the nature of the transaction and the circumstances of the particular case are to be considered. In *Warrington* v. *Furbor* (*a*), where a commission of bankrupt had issued against the acceptor before the bill became due, presentment for payment to him was held unnecessary in order to charge the guarantee. *Phillips* v. *Astling* (*b*) stood upon different grounds. In that case the bill was not presented for payment when it became due, as it ought to have been. Two days afterwards, notice that it was still unpaid was given to the drawer, for whom the defendant was guarantee. No notice was even then given to the defendant. The drawer and acceptor continued solvent for many months after the bill was dishonoured, and it was not until they became bankrupts, that any claim was made on the defendant. Under these circumstances, because the necessary steps had not been taken to obtain payment from the parties to the bill while they continued solvent, the Court of Common Pleas held the guarantee to be discharged. In *Holborow* v. *Wilkins* (*c*) the acceptors were known to be insolvent before the bill had become due. Some days after that fact was known the plaintiffs wrote to the defendant, desiring him to accept a new bill, which he refused to do. The bill was not presented for payment when due, nor was any notice of the non-payment given to the defendant. It appeared that

(*a*) 8 East, 210. (*b*) 2 Taunt. 206. (*c*) Ante, vol. ii. 59.

1824.

Van Wart v. Woolley.

the bill would not have been paid if presented; but it did not appear that the defendant had sustained any damage by reason of the want of presentment and notice; and on that ground this Court held the guarantee not to be discharged. These decisions shew that cases of this kind depend on the circumstances peculiar to each. In the present case it does not appear that *Irving* and Co. have sustained any damage by the want of notice of the non-acceptance of the bill. *Cranston* and Co., the drawers, were not entitled to such notice; they had no right to draw the bill, and they sustained no damage. They had become bankrupts some weeks before notice of the non-acceptance could have reached *Irving* and Co. Nothing appears to shew that *Irving* and Co. lost any remedy that they might have had against *Cranston* and Co., or their estate; if, indeed, they ever could have had any, which does not appear affirmatively. The circumstances under which they received the bill are not disclosed, and it is not impossible that they may have received it upon the terms of being accountable, only in case it was accepted. I come now to advert to the supposed loss sustained in respect of *Cranston* and Co., the drawers of the bill. I have already noticed that the amount of that loss has not been inquired into or ascertained. Perhaps it may be merely nominal, but if it is so, the plaintiff is entitled to a verdict for nominal damages. In order, therefore, to do justice between these parties, we think the case must be submitted to another jury, to ascertain the real amount of the loss, (it being clearly understood that the plaintiff is at all events entitled to a verdict), unless the parties can agree upon the amount, and correct the present verdict accordingly, which it will be highly for their advantage to do.

Rule absolute for a new trial.

Keene v. Deeble.

Friday, 26th Nov.

Defendant, having been held to bail for 38*l*., paid 2*l*. into Court, which the plaintiff did not take out, but before the case was called on for trial, it was agreed to refer the cause and all matters in difference to an arbitrator, with power to him to examine the parties on oath, and call for books, &c.; the costs of the cause to abide the event; and the arbitrator having awarded only 1*l*. 19*s*. in addition to the 2*l*. paid into Court:—Held, that the defendant was not entitled to his costs under 43 *G*. 3. c. 46. s. 3.

THE plaintiff arrested and held the defendant to bail for 38*l*. for goods sold and delivered, and declared in assumpsit for that amount. The defendant pleaded the general issue, and paid 2*l*. into Court, but the plaintiff did not take out the money. The cause was set down for trial, but before it was called on, the parties agreed, by a Judge's order, to refer the cause and all matters in difference to a gentleman at the bar, to whom power was given to examine the parties on oath, and call for all books, papers, and vouchers, relating to the matters in dispute. The costs of the cause were to abide the event, and the costs of the reference and award were to be in the discretion of the arbitrator. The arbitrator awarded to the plaintiff the sum of 1*l*. 19*s*. only, in addition to the 2*l*. paid into Court. On a former day a rule nisi was obtained, calling upon the plaintiff to shew cause why the Master should not tax the defendant his costs under 43 *Geo*. 3. c. 46. s. 3., on the ground that the plaintiff had *recovered* less than the sum for which the defendant was held to bail.

Bolland now shewed cause. This case is clearly not within the statute, on two grounds; first, that the defendant has paid money into Court; and second, that by agreeing to refer the cause to arbitration, he has waived all benefit which might otherwise have resulted to him from the statute. Upon the first point, *Butler* v. *Brown* (*a*) and *Davey* v. *Renton* (*b*) are authorities. [*Bayley*, J. In those cases the plaintiff took the money out of Court, and no further proceedings were had, and on that ground the Court held that the cases did not come within the statute.] At all events, after the defendant has agreed to refer the cause and all

(*a*) 3 J. B. Moore, 327; S. C. 1 B. & B. 66.
(*b*) Ante, vol. iv. 186.

1824.
KEENE v. DEEBLE.

matters in difference to an arbitrator, he cannot avail himself of the statute, because he thereby appeals to a different tribunal from a Court and jury. The arbitrator in this case is not merely put in loco of a jury, to assess the amount of the damages, but a more extensive jurisdiction is given to him, for he has power to examine the parties themselves on oath, &c., inquire into any other matters in difference between the parties, and the costs of the cause are to abide the event of his award. The award by the arbitrator of 1*l.* 19*s.* cannot be considered as a sum *recovered* within the meaning of the third section of the statute. The statute applies to sums *recovered* by the verdict of the jury or by the judgment of the Court, and not to a sum awarded by an arbitrator to whom the cause and all matters in difference are referred. On this ground, therefore, the plaintiff is deprived of the benefit of the statute.

Crowder, contrà. The cases of *Butler* v. *Brown* and *Davey* v. *Renton* have already received an answer from the Court, because in both those cases the plaintiffs took the money out of Court, and proceeded no farther in the actions. In the latter case the Court laid it down as a general rule, that where a cause is stopped by the plaintiff's taking money out of Court, which has been paid in by the defendant, the statute does not apply. That general rule was laid down after due consideration of all the authorities in both Courts upon the statute. This case, however, is distinguishable from all other cases which have been hitherto decided on that ground, because here the money was not taken out of Court. Then the question is, whether the fact of the record in this case having been withdrawn, and the parties agreeing to refer the cause to an arbitrator, makes any difference as to the operation of the statute. Now, where a verdict is taken at the trial for a nominal sum, subject to an order of reference for ascertaining the amount of the damages, by which the costs are directed to abide the event of the award, and the arbitrator finds a less sum to

1824.
Keene v. Deeble.

be due to the plaintiff than that for which the defendant was arrested, it has been held that the sum so found, and for which judgment is afterwards given, is to be considered as a sum *recovered* within the meaning of the act, so as to entitle the defendant to apply for costs: *Neale* v. *Porter* and *Burns* v. *Palmer* (*a*). The only distinction between this case and those, is, that here the record was withdrawn before the cause was called on, whereas there, the jury were sworn, and a nominal verdict was taken, subject to a reference. [*Bayley*, J. But that makes all the difference; for if the verdict is taken subject to a reference as to the amount, the sum awarded would be considered as a sum recovered in the action, and upon which judgment would afterwards be entered.] In *Robinson* v. *Elsam* (*b*) there was merely a reference to the Master to tax the attorney's bill, and although there was no verdict or judgment, yet the Court held that the Master's allocatur was to be considered as a *recovery* within the meaning of the statute. [*Bayley*, J. If a defendant comes in and submits without going to trial, that is analogous to suffering judgment by default; and if the damages are ascertained, there is no occasion to send the case to a jury. The writ of inquiry to assess the damages is only to inform the conscience of the Court as to the amount for which the judgment shall be entered. In the case of *Robinson* v. *Elsam* the defendant admitted his liability to pay something; but by a Judge's order it was referred to the Master of the Court to tax the plaintiff's bill. The Master was placed in the situation of an arbitrator, and therefore the sum which he awarded by his allocatur would be considered as a sum recovered in the action, and on that ground the Court held the case to be within the statute (*c*).

(*a*) Tidd, 1020, 8th ed. Vide, 1 J. B. Moore, 92.

(*b*) 5 B. & A. 661.

(*c*) Vide *Dromfield* v. *Archer*, ante, vol. i. 67; *Payne* v. *Acton*, 3 J. B. Moore, 605; S. C. 1 B. & B. 278; *Laidlaw* v. *Cockburn*, 2 N. R. 76; *Rouveroy* v. *Alefson*, 13 East, 90; *Silversides* v. *Bowley*, 1 J. B. Moore, 92; *Porter* v. *Pittman*, ante, vol. ii. 266; and *Austin* v. *Debnam*, ante, vol. iv. 653.

1824.

KEENE v. DEEBLE.

ABBOTT, C. J.—I think, upon an attentive perusal of the act of parliament in question, this case does not come within its meaning. Looking through the whole of the 3d section it is manifest that the legislature contemplated a recovery by verdict, on which judgment should be afterwards entered. The words of the section are, "In all actions to be brought in *England* or *Ireland*, wherein the defendant shall be arrested and held to special bail, and wherein the plaintiff shall not *recover* the amount of the sum for which the defendant in such actions shall have been so arrested and held to special bail, such defendants shall be entitled to costs of suit, to be taxed according to the custom of the Court, &c., provided that it shall be made appear to the satisfaction of the Court, that the arrest was without reasonable or probable cause." In the cases cited by Mr. *Crowder*, with the exception of *Robinson* v. *Elsam* (*a*), where costs were given to the defendant after the cause had been referred, the awards were made under orders at Nisi Prius; in each a verdict was taken, and then the arbitrator was merely put in the place of the jury for the purpose of ascertaining the amount for which the judgment was afterwards entered up. *Robinson* v. *Elsam* was not a case of that description, but it was the case of an attorney suing for his bill of costs, and the Court, by virtue of the control which they have over their own officers, ordered the bill to be referred to the Master for taxation, and, therefore, it was not like the case of a reference to an arbitrator with the consent of the parties. The Master took off a very large portion of the amount of the bill, for which the defendant was held to bail. But I thought it unnecessary to decide whether that case was within the statute, as the plaintiff was an attorney; but, in the exercise of that jurisdiction which we have over the officers of the Court, we should do right to compel the plaintiff to pay the costs of the action. I doubt whether that case was within the act of parliament, although my brother *Bayley* expressed a

(*a*) 5 B. & A. 661.

more decided opinion upon the subject. In the present case, however, the cause was stopped in its progress by an agreement between the parties to refer, not merely the cause, but all matters in difference, and it was further agreed that the costs of the cause were to abide the event of the award. The award being in favour of the plaintiff for a very small sum of money, I am of opinion that money awarded under such a reference is not money *recovered* within the meaning of the act, and consequently the 43 *Geo. 3.* will not apply.

BAYLEY, J.—I think *Robinson* v. *Elsam* was within the act, but it seems to me that this case is not. The words of the act clearly refer to cases in which the party shall *recover* by action. When there is an award under an order of Nisi Prius, the plaintiff is to be considered as recovering by verdict and judgment in the action. In the case of *Robinson* v. *Elsam*, where there was a reference to the Master to tax the amount of the attorney's bill, there was an undertaking to pay the amount at which it should be taxed, and if it was not paid, the plaintiff would have had a right to enter up judgment for the amount, as much as if he had recovered it by the verdict of the jury. In that case there is no doubt that the Court would have directed the judgment to be entered up, and execution taken out for the sum found to be due. It seems to me, therefore, that that case came within the words as well as within the spirit of the act of parliament. Perhaps this case may come within the spirit, but it does not come within the words of the statute, for the words are, "in all actions wherein the plaintiff shall not *recover* the sum for which the defendant has been arrested." In this case the money is awarded upon a reference of the action and all matters in difference. In the order of reference, the parties might have provided for the event which has happened. The defendant might have said "I will not refer, unless the plaintiff will consent that I shall have every privilege to which I would be entitled in the case of a verdict by a jury." Instead of that he consents to refer the cause and

1824. KEENE v. DEEBLE.

all matters in difference to an arbitrator, and that the costs shall abide the event of the award. Therefore, it seems to me, that this case is not within the statute, the money not having been *recovered in the action.*

HOLROYD, J.—I am also of opinion that this is not a case within the act of parliament, because the act extends to money *recovered* in the action, and in the action only. It is true that this is a remedial statute, but it is penal in its effects, and must be construed strictly, and therefore we cannot extend the words to a case not expressly within its meaning. It obviously applies to sums recovered in the action, and not to sums awarded under a submission to a reference of the cause and all matters in difference.

LITTLEDALE, J.—I am of opinion that the word *recovered,* as used in this statute, means recovered by the judgment and consideration of the Court, in legal language, and that the statute must be restrained to the technical meaning of the word *recovered.* This is made more obvious by the subsequent part of the clause; for, after providing for the taxation of costs, it goes on to direct how execution shall issue :—" And the plaintiff shall, upon such rule or order being made as aforesaid, be disabled from taking out any execution for the sum recovered in any such action, unless the same shall exceed, and then in such sum only as the same shall exceed the amount of the taxed costs of the defendant in such action." I am by no means prepared to say that a sum recovered by judgment entered up in pursuance of a reference after verdict, is not within the act, and that we should not be bound to say that such a case was within the meaning of the clause. But here the cause was referred before it came on for trial, and the rule of reference goes beyond the mere action, and introduces a power for the arbitrator to determine all matters in difference. It also provides a different mode of determining the cause and adjusting the disputes between the parties than could have

1824.

KEENE v. DEEBLE.

been adopted before a jury. The arbitrator had power to examine the parties themselves on oath, and call for their books, papers and writings, and the parties have agreed altogether to a different mode of proceeding. At the trial the evidence of neither party could have been received, but before the arbitrator the defendant might, by his own evidence, have reduced the plaintiff's claim to a mere nominal amount. It appears to me, therefore, that where parties, by their agreement, take a case out of the ordinary course of investigation, they take it out of the operation of this statute. In this case also it was stipulated that the costs should abide the event, and that, as it appears to me, means the legal event, resulting in ordinary cases, without any application to the Court. Upon that point, however, it is not necessary to give any express opinion. It is sufficient to say that the parties have, by their special agreement, taken the case out of the operation of the statute.

Rule discharged.

Saturday, November 27.

In the matter of R. J. ELSAM, Gent. one, &c.

Where an attorney, without any corrupt or unworthy motives, prepared a special case in order to take the opinion of the Court upon the will of a testator, and suggested several facts which had no foundation:— Held, that he was guilty of a contempt, and he was fined in 30*l.* for his offence.

A SPECIAL case entitled *Fox* v. *Dodd* having been stated for the opinion of the Court, upon the construction of the will of *John Fox*, of *Richmond*, in the county of *Surrey*, it was set down for argument at the sittings before this term. After the case had been argued by *Talfourd* on the one side, and *Chitty* on the other, the Court intimated a doubt whether certain facts stated on the case had really any foundation, and therefore required that Mr. *Elsam*, an attorney of this Court, and the devisee named in the will, should exhibit a recovery stated in the case to have been suffered, and also a contract of sale supposed to have been made with the defendant *Dodd*, together with an affidavit of its due execution, and that the transaction was real and bonâ fide. On a sub-

1824.

In re Elsam.

sequent day the Court was informed by counsel that these conditions could not be complied with, and therefore requested that the case might be withdrawn from the further consideration of the Court. On that occasion the Court expressed its disapprobation of the attempt made to impose upon the Court, and in the result directed that the matter should be referred to the master to report which of the facts stated in the special case were truly stated, and to ascertain what proceedings had taken place in the cause previous to the ingrossment of the record of nisi prius.

The *Master* now reported that most of the facts stated in the case were without foundation. The case falsely stated that the testator had died on the 14th *December*, 1822, he having, in fact, died in 1823; that Mr. *Elsam* had suffered recoveries of the property, and that he had sold the premises to the defendant. The Master further reported that no writ had been issued in the cause; that no common bail had been filed; that no declaration had been filed or delivered; and that no proceeding had been taken in the cause, prior to the making up of the record of nisi prius, except entering the issue.

Mr. *Elsam* being present when the Master's report was read, put in an affidavit in extenuation of his contempt. The affidavit stated in substance, 'that the testator *John Fox* by his will devised all his estate real and personal to deponent, to hold to him and his heirs for ever, subject to a condition that if he, deponent, should happen to die without issue lawfully begotten of his own body, the said estates should go to seven other great nephews and nieces, to hold to them, their heirs and assigns for ever, as tenants in common; and if any of the devisees over should die in the interim, the children of them so dying should take their parents share, and, for want of such children, to be divided equally among the survivors; that the testator then gave several pecuniary legacies to his great nephews and nieces, and to

other persons, which he expressly charged upon and made payable out of his real estates, which he also charged with the payment of his debts and funeral and testamentary expenses. The affidavit then stated that since the testator's death the deponent had paid the whole of the legacies, with the exception of some small sums which had not yet been paid in consequence of the minority of some of the legatees. He then stated that the testator had made a very erroneous calculation as to the amount of his debts, and that he had not sufficient assets to satisfy them and the legacies without selling the freehold property. That deponent, having been appointed sole executor and becoming personally liable, he was unable to pay the debts and legacies without raising money by mortgage or annuity at a great expense. Conceiving that under the will he himself took an estate tail, he submitted the will to counsel, who was of opinion that he did take an estate tail, but suggested that it might be argued that the words "if he shall happen to die without issue," referred to the time of deponent's death, and thus gave him a fee simple, subject to an executory devise, in case he died leaving no issue living. That upon this suggestion, and placed in the difficulty of being unable to raise money but by mortgage, he was induced to bring an action in the nature of a feigned issue for the purpose of taking the opinion of a Court of Law upon the construction of the will, in order that, if the Court should be of opinion that he took a fee simple, he might be enabled to supply the deficiency in the testator's estate by raising money on the most advantageous terms. In doing this, however, he was not aware that he was guilty of any contempt of Court. But in order that the question might be fairly and fully discussed, he had instructed counsel on both sides to argue the case, without informing them that it was a feigned issue, and he was most anxious, and took every pains in his power to prevent the interests of the devisees over from being prejudiced by the proceeding. He had incurred an expense of 40*l.* in instituting the proceeding, and he trusted that, as he

1824. In re Elsam.

had acted ignorantly and without any fraudulent or unworthy motive, the Court would visit his offence as leniently as possible.

W. E. Taunton addressed the Court on behalf of Mr. *Elsam*, in mitigation of punishment.

Abbott, C. J.—This person appears now before us to receive punishment for a contempt of the Court. What he has done has not operated injuriously to any other person, nor probably was it intended to affect any other individual; but undoubtedly he has been guilty of a great contempt of this Court in calling upon the Court for its decision upon a state of facts which had no existence. To present a record at Nisi Prius for trial without any of those previous proceedings, which the law requires, and this without any cause of action really existing, is so great an offence, that it is impossible for the Court to pass over it without animadversion. This party, however, has the benefit of not having in any degree attempted to conceal his error when once the suspicion of the Court was made known. He has not added any thing to his former offence, and he has, by the very transaction which is the subject of complaint against him, been put to an expense of not less than 40*l*. Under these circumstances, and it being very much the object of the Court to prevent a repetition of a transaction of this kind, rather than to press with any peculiar severity upon a person, who, for the first time during many years practice, has been the object of censure, the sentence which we now pronounce is, that Mr. *Elsam* do pay to the King a fine of 30*l*. and that he be imprisoned until that fine be paid.

1824.



LANG and others *v.* ANDERDON.

Saturday, November 27.

Policy on goods by ship or ships at and from *Demerara* to *London*, warranted to *sail from Demerara* on or before 1st *August*, 1823. Usage found for small vessels to load and unload all their cargo in the river of *Demerara*, and for large vessels to load and unload part of their cargo on the outside of a shoal off *Demerara*, about ten miles at sea. The goods insured were loaded on board a small vessel which completed her cargo in the river, the captain of which, having obtained his clearance, set sail on 1st *August*, proceeded down the river, and about two miles out to sea, and there anchored, at low water, by the advice of his pilot. On 3d *August* he crossed the shoal and proceeded on his voyage, in the course of which the vessel was lost by perils of the sea:—Held, that the vessel *sailed from Demerara* on the 1st *August*, within the meaning and in satisfaction of the terms of the policy.

ASSUMPSIT on a policy of assurance on goods, by ship or ships at and from *Demerara* to *London*, warranted to sail *from Demerara*, on or before 1st *August*, 1823. Plea, non assumpsit, and issue thereon. At the trial before *Abbott*, C. J. at the *London* adjourned sittings after last *Hilary* Term, the following were the facts proved. Goods, of a value within the amount of the policy, were shipped on board the snow *Iris*, then lying in the river, opposite to the town of *Demerara*. The *Iris* was of 200 tons burthen, and it is the universal custom for vessels of that burthen to take in their cargoes and to clear out for their voyage, in the river, at or near the spot where she loaded. The mouth of the river is about two miles below the town, and about three miles beyond that there is a shoal, which extends six miles. It is the custom for vessels of greater burthen to take in only part of their cargoes in the river, and then to go over the shoal, and there complete their loading; and in the mean time their papers remain at the custom-house, and are delivered to them when their loading is complete, if no irregularity appears. The captain of the *Iris*, having completed his loading and received his papers, unmoored on the 1st *August*, and sailed down to the mouth of the river, where, the tide being then low, he came to anchor, and did not cross the shoal that day. On the 3d *August* he crossed the shoal, and dismissed his pilot; and on the 8th of the same month the ship and cargo were totally lost by perils of the sea. Upon these facts it was contended, on the part of the defendant, that the warranty "to sail from" meant "to depart from" *Demerara* on the 1st *August*, and was consequently not complied with by merely sailing down to the

1824.

LANG v. ANDERDON.

mouth of the river on that day; and that the ship, in fact, did not sail from *Demerara* until the 3d *August*, when she crossed the shoal. The Lord Chief Justice left it to the jury as a question of fact, whether the ship did or did not sail from *Demerara* on the 1st *August*, and they finding that she did, the plaintiffs had a verdict.

Scarlett, in *Easter* Term, having obtained a rule nisi for a new trial,

Copley, A. G., *Gurney* and *Kaye*, on a former day in this term, shewed cause. The short question is, whether the ship sailed on the 1st *August*, the day limited by the policy for that purpose. Had the warranty been merely "to sail," without the words "from *Demerara*," it would clearly have been complied with, because a bonâ fide commencement of the voyage is a compliance with such a warranty, even though the ship does not finally clear out from the port on the day named. But it is said, "to sail from" means "to depart," and to depart has been held to mean, to clear out from the port, and therefore this case comes within that of *Moir* v. *The Royal Exchange* (*a*), in which it was held that a vessel had not departed until she had finally left the port. It seems difficult to distinguish between sailing and departing, and a distinction between "sailing" and "sailing from" is almost too refined for comprehension; but, even allowing for such a distinction, this warranty has been complied with, for the ship did clear out of the port on the 1st *August*, by dropping down the river, and anchoring beyond it in the open sea. It is true that she anchored within the shoal, but the shoal is not part of the port; for though large vessels complete their loading withoutside the shoal, that is done by permission of the underwriters who know the usage of the place, and does not prove that the shoal is within the port. If a vessel bound to *Demerara*, with a policy *to Demerara*, were to anchor withoutside the shoal, and dis-

(*a*) 3 M. and S. 461. 6 Taunt. 241. S. C. 1 Marsh. 570.

charge part of her cargo there, and while she lay there a loss were to occur by one of the perils insured against, it would be impossible to say that she had arrived *at Demerara*, and consequently that the policy had expired. In point of legal construction, then, the *Iris* did sail from *Demerara* on the proper day; though, whether she did so or not was a question of fact for the jury, which they having found in favour of the plaintiffs, the Court will not entertain.

Scarlett, *Campbell*, and *F. Pollock* contrà. This is purely a question of law, for the facts out of which it arises are not disputed. The whole argument on the part of the plaintiffs proceeds upon the assumption that the warranty was to sail from the *port* of *Demerara;* it must therefore fail, because *Demerara* is a province, and there is neither *port* nor *town* mentioned in the policy. If the plaintiffs' argument is correct, it follows that a policy at and from *Demerara* would never attach at all, if the vessel happened not to go within the shoal; whereas the law would clearly construe any spot where vessels usually took in their cargoes to be a part of *Demerara*. If the *Iris* and her cargo had been insured *at Demerara*, and she had been wrecked on the 2d *August*, while lying within the shoal, the loss would clearly have been covered by the policy; and if so, it follows, that she had not then sailed *from Demerara*. The case of a large vessel, being about to cross the shoal, and then to anchor for the completion of her cargo, would be beyond the reach of doubt; and to construe the limits of the port differently according as vessels differed in their tonnage, would be extremely inconvenient, especially in cases like the present, where the policy is upon goods by ship or ships. Here the warranty is "to sail from *Demerara*" on a given day; that phrase implies exclusion; it means to depart; and it is not satisfied unless the vessel actually removes out of and beyond the limits of the port or place from which she is to sail. That has been decided in *Moir* v. *The Royal*

1824.

LANG
v.
ANDERDON.

Exchange, and there is no reasonable distinction between that case and the present.

The Court took time to consider of their judgment, which was now delivered by

ABBOTT, C. J.—This was an action of assumpsit on a policy of assurance on goods by ship or ships at and from *Demerara* to *London*, with a warranty to sail from *Demerara* on or before the 1st day of *August*, 1823; and the only question in the case was, whether the warranty was complied with. The facts were these. The vessel, having completed her cargo and obtained her clearances, sailed from the town, which is on the bank of the river, about noon on the 1st *August*, passed the fort, which is on a point at the mouth of the river, and anchored the same evening about two miles beyond the port. She anchored there by the advice of the pilot, who objected to her sailing at the night tide, and she remained there about twenty-four hours, when she proceeded on her voyage, in the course of which she was afterwards lost. There is a shoal about ten or twelve miles from the fort, on the outside of which large inward bound vessels of heavy burthen usually anchor and discharge some of their cargo, and large outward bound vessels usually anchor and complete their cargo. The pilots usually leave outward bound vessels when they have passed this shoal. Upon these facts it was contended, first at the trial, and afterwards on motion, that the words "sail from" in the policy must be construed to mean "depart," and that the vessel did not sail from *Demerara* on the 1st *August*, within the true intent and meaning of the warranty. It is clear that a warranty *to sail* merely, without the word "from," is not satisfied by a vessel weighing anchor, getting under sail, and moving onwards, unless at the time when she performs those acts she is completely ready for the performance of the voyage, and does those acts as the commencement of it.

1824. LANG v. ANDERDON.

This appears from the case of *Bond* v. *Nutt* (*a*), and was expressly held in the case of *Ridsale* v. *Newnham* (*b*). If this vessel had anchored on the outside of the shoal for the purpose of completing her cargo, she would not only not have *sailed from Demerara*, within the meaning of this warranty, but would not even have *sailed* within the meaning of the warranty to which I first alluded. It was insisted that the words "from *Demerara*" must have the same import in all cases, and must therefore be construed to mean "sail from the outside of the shoal," that is, from the place at which some vessels load or unload a part of their cargo; for that otherwise one vessel might be said to sail from *Demerara* before she had arrived at that part of the sea from which another vessel must depart before she could be said to have sailed from *Demerara*; and that such might even have been the case with respect to two ships having on board the goods insured by this policy. That argument might prevail, if that part of the sea which lies on the outside of the shoal was, in a popular or general sense, part of *Demerara*; but the fact appears to be otherwise: for, whether we regard *Demerara* as the name of a province, which it is, or of the river occasionally called the river *Demerara*, though correctly speaking it should be called the river *of Demerara*, we think no person, speaking in popular language, could say that a vessel, lying on the outside of the shoal, ten or twelve miles from land, was *at Demerara*, but that she would be described as lying *off Demerara*. The words of a policy are, in the language of Lord *Ellenborough* in *Robertson* v. *French* (*c*), to be construed in their plain, ordinary and popular sense, unless they have generally, in respect to the subject matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that they must, in the particular instance, and in order to effectuate the immediate intention of the parties, be understood in some other special and peculiar sense. It

(*a*) Cowp. 601. (*b*) 3 M. and S. 456. (*c*) 4 East, 130.

1824. Lang v. Anderdon.

appears from this case that large vessels of heavy burthen usually anchor on the outside of the shoal, and complete their cargo there, and therefore goods so laden may properly be considered as laden *at Demerara* by reason of the usage, and such a vessel could not properly be said to sail, until she had so completed her cargo, and quitted that part of the sea. In such a case, the loading part of her cargo there, is like the loading part on the outside of the bar at *Oporto*, which was held, in *Kingston* v. *Knibbs* (*a*), to be within the protection of the policy, by reason of the usage. But such a usage cannot be allowed to operate beyond the cases that fairly and necessarily fall within it. In *Moir* v. *The Royal Exchange* (*b*), which was an action on a policy of insurance at and from *Memel*, warranted to *depart* on or before the 15th *September*, the ship having completed her cargo and obtained her clearance, began to sail on her voyage, and proceeded some way down the river before the 15th *September*, but was obliged by change of weather to anchor within the limits of the port of *Memel*, where she remained till after that day. The Court of Common Pleas, construing, as this Court had previously done, the word departure to mean departure *from the port of Memel*, held, that the warranty was not satisfied; but Lord Chief Justice *Gibbs* added, that if the warranty had been to *sail*, he should have been of opinion that the ship had sailed before the day specified. In the present case we think we cannot hold that the warranty has not been satisfied, merely because it would not have been satisfied in the case of a different kind of vessel, which might have been intended to complete her cargo after she had passed the shoal. Our decision will not have the effect supposed in argument of attributing two distinct meanings to the name *Demerara*, but is merely conformable to existing authorities and distinctions as to the meaning of the word *sail*, and to that operation which it has been held may and ought to be given to the terms of a policy, by reason of usage, and in particular instances.

(*a*) 1 Camp. 508. in notis. (*b*) 6 Taunt. 241. S. C. 1 Marsh. 570.

For these reasons we are of opinion that the rule for a new trial ought to be discharged.

Rule discharged.

STEPHENS *v.* WESTON and GRIFFITHS.

Saturday, November 27.

Where the defendant applied to set off the costs and damages recovered in an action brought by him, against the costs and damages recovered in an action brought against him:—Held, that the plaintiff's attorney had a lien upon the judgment obtained by his client against the defendant, for the amount of his costs in that cause only.

WESTON, in *September*, 1822, distrained for rent upon a farm occupied by *Stephens*, as his tenant, and, the produce of the distress not being equal to the arrears, on the 3d *October* brought an action against *Stephens* for the balance, which was tried at the *Herefordshire Lent* Assizes, 1823, and in which he obtained a verdict, with damages, amounting, together with the taxed costs, to 433*l.* 10*s.* *Stephens*, in *November*, 1822, brought an action against *Weston* and three other persons employed by him in levying the distress, and at the same Assizes obtained a verdict, with damages, amounting, together with the taxed costs, to 208*l.* 10*s.*, which sum was paid on the 3d *November*, 1823. *Stephens*, also, in *November*, 1822, brought another action against *Weston*, *Griffiths*, and two other persons, named *Harris* and *Cole*, for taking possession of his farm, under an order of two magistrates, made as upon a vacant possession; and also appealed against that order. This last action and the appeal were tried also at the *Lent* Assizes, 1823, when *Stephens* recovered against *Weston*, *Harris*, and *Cole*, but *Griffiths* was acquitted, and the farm was ordered to be restored upon the appeal. The farm was restored accordingly on the 1st *April*, and the damages and taxed costs in the action, amounting together to 88*l.* 10*s.*, were paid on the 5th *November*, 1823. *Stephens*, in *April*, 1823, brought the present action against *Weston* and *Griffiths*, for a continuation of the trespass in keeping possession of the farm from the 18th *September*, 1822, to the 1st *April*, 1823; during which period *Griffiths* had the actual occupation of the farm, as tenant to *Weston*, under a promise of indemnity. *Weston*

1824.
STEPHENS
v.
WESTON.

and *Griffiths* suffered judgment to go by default in this action, and judgment having been signed on the 16th *July*, a writ of inquiry was executed on the 15th *September*, and the damages assessed at 160*l.* *Weston* died on the 16th *October*, and in the following *Michaelmas* Term, an application, to which his personal representatives were parties, was made to the Court, to set off the damages and costs in this action against the damages and costs in that action in which he was plaintiff, and in which he recovered 435*l.* 10*s.*; and a rule was made that it should be referred to the Master to ascertain the extent of the lien of the plaintiff's attorney upon the judgment obtained in this cause, and that the damages and costs in this action should be set off against the damages and costs of that action in which *Weston* was plaintiff, subject to such lien. The Master reported that the plaintiff's attorney had a lien upon the judgment for all the business done for the plaintiff in those causes, in which the parties were virtually the same, and which arose out of the same transaction, and he taxed all the bills of costs in all the cases, as between attorney and client. He also taxed the costs in this cause at 76*l.* 10*s.*, and reported that the lien of the plaintiff's attorney upon the judgment obtained in this cause, amounted to 188*l.* 17*s.* 11*d.*

Marryat and *Chitty* now shewed cause, and contended that the lien of the plaintiff's attorney extended to the amount of his costs in *all* the actions, inasmuch as they all arose out of the same transaction. The general rule adopted by the Court was, that the equitable claims of the parties to a suit should not prejudice the lien of the attorney, and that rule applied to the present case. If the plaintiff's attorney had received the damages and costs in the present suit, he would clearly have been entitled to retain them for his general balance; therefore, if the defendants were allowed to set off the amount of the judgment obtained by them, against the damages and costs in the present suit, the plaintiff's attorney must necessarily lose that general lien,

1824.
Stephens v. Weston.

which otherwise he would have had. It was held in *Harrison* v. *Bainbridge* (*a*), that the costs of a bill in Chancery, dismissed in favour of the defendant, might be set off against the plaintiff's costs of a suit in this Court for the same cause of action, but subject to the attorney's *general* lien, and that was an authority to shew that the attorney's lien in the present case was general, and extended to his costs in all the causes. They also cited *Middleton* v. *Hill* (*b*) and *Tidd's* Practice.

W. E. Taunton, contrà, was stopped by the Court.

Abbott, C. J.—The only case adduced to shew that an attorney has a general lien upon a judgment obtained by his client against a defendant, is the very recent one of *Harrison* v. *Bainbridge,* in which I am represented, I dare say correctly, as using the expression, "subject, however, to the attorney's *general* lien." If I used the expression, which in all probability I did, I must have intended by a *general* lien to describe the *usual* lien; such lien as the Court usually recognised and allowed: I certainly did not mean to give to the word the import which is now attributed to it. But the question in that case was not whether the lien was general or special, but whether the costs of a bill in Chancery, which had been dismissed, could be set off against a judgment obtained in an action for the same cause; and the Court held that it might, subject to the attorney's lien. That case, however, was referred to the Master to ascertain the amount of the lien, and is now pending before the Master, who waits for our decision in the present case before he makes his report. I know of no case in which it has been held that an attorney's lien extends beyond the costs of the immediate suit. In *Middleton* v. *Hill* the costs in error were considered as costs in the cause, because a writ of error is a part of the suit itself; but here the attorney claims

(*a*) Ante, vol. iv. 363.

(*b*) 1 M. & S. 240.

1824.

STEPHENS v. WESTON.

a lien not only for the costs of his suit, but for the costs of other causes in which the damages and costs have been paid. To allow such a lien, would be to compel this defendant to pay the costs twice over, which would clearly be unjust. Neither ought the plaintiff to be allowed a lien for the costs of the appeal, because it does not appear from the affidavits that the appeal was a necessary step to enable the plaintiff to maintain the action for the trespass, and therefore the appeal cannot be considered a part of the cause, as the writ of error was in *Middleton* v. *Hill*. We shall, as it seems to me, answer all the ends of justice by laying it down as a general rule, that where a party applies to set off judgments in cross actions, the attorney shall have a lien for the costs in the particular cause only; and I am of opinion that that is the only lien to which an attorney is by law entitled.

BAYLEY, J.—This is an application to the equitable jurisdiction of the Court. The Court of Common Pleas hold an attorney's lien for costs to be subject to the equitable claims of the parties in the cause; but in this Court a party is never permitted to set off a judgment, unless the attorney's bill of costs in the cause has previously been discharged. I know of no authority for saying that an attorney in such a case has a general lien, and *Middleton* v. *Hill* is, I think, on the contrary, an authority for saying, that the lien is confined to the costs in the particular cause. It was there held that the lien of the plaintiff's attorney upon the debt and costs recovered in the cause, after the judgment had been affirmed upon a writ of error, must be satisfied before the defendant could set them off against a judgment obtained by him in a cross action against the plaintiff; and further, that the costs in error were costs in the cause, because the writ of error was parcel of the cause. It was there objected that the costs in error ought not to be included in the costs allowed to the plaintiff's attorney; but the Court held otherwise, and said that the costs in

1824.

STEPHENS *v.* WESTON.

error were costs in the cause; for the plaintiff was not completely possessed of the judgment, until the writ of error was determined. Now that question could not possibly have arisen there, if the attorney had been entitled to a general lien, and therefore it is evident that it was considered, both at the bar and by the bench, that the lien extended only to the costs in the cause.

HOLROYD, J.—It by no means follows that because an attorney has a general lien as against his own client, he should therefore have a general lien affecting the rights of third persons. Where an attorney has incurred expenses in obtaining a judgment, it is no more than just that his claim should be satisfied out of those funds which he has been instrumental in procuring for his client. More than that justice does not require, and there is neither authority nor principle for holding that an attorney has a general lien for costs against the defendant in such a case as this.

LITTLEDALE, J. concurred.

Rule absolute.

WILKINSON and others *v.* JOHNSTON and others.

Saturday, November 27.

A bill of exchange, bearing, among others, the *supposed* indorsement of *H.* and Co., bankers at *Manchester*, was presented for payment in *London*, where it was made payable by the acceptor, and dishonoured. At the request of the notary who presented the bill, plaintiff, the *London* correspondent of *H.* and Co., took up the bill for their honour, but struck out all the indorsements subsequent to that of *H.* and Co., and the money was paid to defendant, the holder of the bill. The same morning, plaintiff, having discovered that the signatures of the drawer, the acceptor, and *H.* and Co., to the bill, were forgeries, sent notice thereof to defendant, and demanded the money back; and that notice was sent so early, that notice of the dishonour might have been sent to the indorsers by the same day's post. In assumpsit for the amount of the bill:—Held, that the erasure of the indorsements did not deprive defendant of his remedy against the prior indorsers, and that plaintiff, having paid the money in mistake, was entitled to recover it back from defendant.

THIS was an action of assumpsit brought by the plaintiffs to recover back the sum of 589*l.* 6*s.* 8*d.* paid by them, as they alleged, in mistake, on three bills of exchange. At

1824.
WILKINSON
v.
JOHNSTON.

the trial before *Abbott*, C. J. at the *London* Sittings before *Michaelmas* Term, 4 *Geo.* 4., a verdict was found for the plaintiffs, subject to the opinion of the Court upon the following case:

About eleven o'clock in the morning of *Monday*, the 3d *February*, 1823, a notary public, who had been employed by Messrs. *Smith, Payne* and *Smith*, to note three bills of exchange which became due on the *Saturday* preceding, and which he had on that day presented for payment at the house of Messrs. *Masterman* and Co., where they were made payable, and refused payment, called, in consequence of the dishonour of the bills, without any order from *Smith, Payne* and *Smith*, with the bills at the banking house of the plaintiffs, who carry on business in partnership together, as bankers in *London*, for the purpose of the same being taken up by the plaintiffs for the honour and on account of Messrs. *A. Heywood*, Sons and Co., who appeared to be indorsers upon the bills, and whose *London* bankers the plaintiffs then were and still are. The following is a copy of one of the bills, and of the indorsements thereon:

"No. £214. 10s.

"*Liverpool, Oct.* 30, 1822.

"Three months after date pay to the order of *Charles Thomson*, Esq. Two hundred and fourteen pounds, ten shillings, sterling; value received, as advised.

"*Cropper, Benson* & Co.

"To Messrs. *Birley* and *Hornby*, *Manchester*.
"To be paid at *Masterman's, London.*"

Across the bill was written "*Birley* and *Hornby*, per *F. Lawson*," and upon it were the following indorsements: "*Charles Thompson.*—*A. Heywood*, Sons and Co.—Pay to the order of Mr. *Henry G. Harvey*, *Geo. Green.*—*Henry G. Harvey.*—Pay Messrs. *H.* and *J. Johnston* and Co., or order, *Gordon, Batt* and Co.—*H. J. Johnston* and Co." The other two bills were in the same form, and bore the same indorsements, but varied in the sum, being each for

187*l*. 8*s*. 4*d*. The notary who presented the bills at the house of the plaintiffs, was employed to present and note them by *Smith*, *Payne* and *Smith*, bankers in *London*, who held them as the bankers and agents of the defendants, who are in partnership together. The plaintiffs, believing that the bills were genuine, and that the indorsement in the names of *A. Heywood*, Sons and Co. was their genuine indorsement, did take up the same for the honour and on the account of *A. Heywood*, Sons and Co., and forthwith paid the notary who presented the bills, the sum of 589*l*. 6*s*. 8*d*., being the amount of the bills, which was carried by the notary and paid to *Smith*, *Payne* and *Smith*, as the bankers of the defendants, and the clerk of *Smith*, *Payne* and *Smith*, immediately entered the same in the counter book as follows:

Birley, 6803	187*l*. 8*s*. 4*d*.	3d *February*.
Do. „	187*l*. 8*s*. 4*d*.	
Do. „	214*l*. 10*s*. 0*d*.	

But, in consequence of the notice hereinafter stated, they said they should not pay the money to the defendants, and thereupon entered the sum in a suspense account; but, notwithstanding such notice, they did afterwards pay over the money to the defendants. The clerk of the plaintiffs, upon paying the money to the notary, struck out all the indorsements on the bills subsequent to that of *A. Heywood*, Sons and Co. Immediately after the bills were paid by the plaintiffs, it was discovered that they were not genuine, but that the names of the drawers and acceptors, and the names of *A. Heywood*, Sons and Co., on whose account the payment had been made, were forgeries. Upon the same day, and before the hour of ten o'clock, the plaintiffs gave notice to the defendants and to *Smith*, *Payne* and *Smith*, that the bills were discovered not to be genuine, but were forged in the particulars before mentioned; and as well *Smith*, *Payne* and *Smith*, as the defendants, were at the same time informed that the names of the indorsers subsequent to the indorsement purporting to be the indorsement of *A. Heywood*,

Sons and Co., had been struck out by mistake, and under the belief that the indorsement purporting to be the indorsement of *A. Heywood*, Sons and Co. was genuine; and the plaintiffs then demanded of *Smith, Payne* and *Smith*, and of the defendants, the money which had been paid by the plaintiffs, which both *Smith, Payne* and *Smith*, and the defendants, refused to return. It was afterwards agreed, without prejudice, by the plaintiffs and defendants, that the defendants should return the bills to the indorsers from whom they received them, which was done accordingly, and such indorsers had due notice of the presentation of the bills at the place where payable, and of their being dishonoured, as also of the circumstances above detailed; but the indorsers refused to take them up, on the ground that the bills had been paid by the plaintiffs, and also on the ground that the indorsements before mentioned had been struck out, and that the said indorsers had thereby lost their remedy over. The question for the opinion of the Court is, whether the plaintiffs are entitled to recover; if so, a verdict to be entered for the plaintiffs; if otherwise, a nonsuit to be entered.

The case was twice argued: first, at the sittings in banc after last term, by *Tindal*, for the plaintiffs, and *R. V. Richards*, for the defendants; and afterwards, at the sittings in banc before the present term, by *Tindal*, for the plaintiffs, and *J. Parke*, for the defendants.

Arguments for the plaintiffs. The plaintiffs were no parties to the bills; therefore, it was in no respect their duty either to know the hands-writing upon them, or to pay them. The bills were brought to the plaintiffs by the agent of the defendants, who must, therefore, be taken as representing them to be genuine. The mistake was discovered immediately, and notice of it given so early, that information of the dishonour of the bills might have been sent to the prior indorsers the same day: therefore the defendants were not

deprived of their remedy against any of the parties. In these particulars the present case differs from all those which can be cited in favour of the defendants. In *Smith* v. *Mercer* (*a*) the plaintiffs were the bankers of the drawee of the bill, the person whose acceptance was forged; and the bill exhibited a supposed direction from him to them to pay it: their duty, therefore, was twofold; to obey the direction of the acceptor, and to make themselves well acquainted with his hand-writing. Besides, there, the mistake was not discovered till after the lapse of a week; when the holder of the bill had lost his remedy against the other parties; and upon that point the judgment of *Gibbs*, C. J. was founded. *Heath*, J. and *Dallas*, J. relied indeed upon the larger ground of default and neglect in the plaintiffs; but *Chambre*, J. differed on both points from the rest of the Court, and was of opinion that the plaintiffs, having paid their money without consideration, were entitled to recover it back. *Smith* v. *Chester* (*b*) only decided that where the drawer's name has been forged, and the acceptor has paid the bill, he cannot recover back the money, *because* he is bound to pay the bill, *and* to know the hand-writing of the drawer. But here the plaintiffs are not acceptors, and had no duty whatever in respect of the bills; and they merely took up the bills for the honour of a supposed indorser; in which respect they stand in a different situation from the plaintiff in *Price* v. *Neale* (*c*). This case assimilates more nearly to that of *Jones* v. *Ryde* (*d*), where the plaintiff, having discounted for the defendant a victualling bill, which proved to have been forged, was allowed to recover the amount from the defendant, although both parties were equally innocent of neglect, and both equally ignorant of the forgery. That case seems in point with the present, and is followed by *Bruce* v. *Bruce* (*e*), another decision to the same effect, determined on the authority of

(*a*) 6 Taunt. 76. S. C. 1 Marsh, 453.
(*b*) 1 T. R. 654. See *East India Co.* v. *Tritton*, ante, 214.
(*c*) 3 Burr. 1351. (*d*) 5 Taunt. 488. (*e*) Id. 495.

1824. WILKINSON v. JOHNSTON.

Jones v. *Ryde*. It will be urged that the plaintiffs, by striking out the subsequent indorsements when they paid the bills, have deprived the defendants of their remedy against those indorsers, and consequently are themselves concluded by that act; but as the erasure was made under a mistake, it was a revocable act, and may be explained or annulled the same as a blot, or a wrong name: *Cox* v. *Troy* (*a*).

Arguments for the defendants. It must be admitted to be the general rule of law, that money paid under a mistake of facts, may be recovered back; but there are two exceptions to that rule; first, where the default or negligence attaches more to the payer than to the receiver; and second, where restitution cannot be made to the payer, without an ultimate injury to the party making it. Now the present case falls within both those exceptions, and with reference to the first, *Smith* v. *Mercer* is expressly in point. The plaintiffs were in the situation of acceptors and payers, uno flatu, for the honour of *Heywood* and Co. If the plaintiffs had actually accepted the bills, they would clearly have been estopped; and having paid them under such circumstances, they are estopped equally: *Price* v. *Neale*. If *Heywood* and Co. had paid the bills, they would certainly have been bound by that payment; so therefore are the plaintiffs, for they were the agents of *Heywood* and Co., and an agent cannot be in a better situation than his principal. Second, restitution cannot be made without an ultimate injury to the defendants. The erasure of the indorsements has so materially altered their situation, that they never can be placed in statu quo: and though the indorsers may not be wholly discharged, still the defendants' remedy against them is greatly impeded, if not entirely lost; for they must necessarily incur great trouble and expense in explaining the mistake which the plaintiffs have made, and in producing evidence, the onus of which has been cast upon them by the plaintiffs' default.

(*a*) Ante, vol. i. 38.

1824

WILKINSON v. JOHNSTON.

Neither is it clear that the defendants could recover those expenses in an action brought against the plaintiffs, because though the injury done to the bills was the act of the plaintiffs, it was done with the knowledge and consent of the agent of the defendants.

Cur. adv. vult.

The judgment of the Court was now delivered by

ABBOTT, C. J.—This case has been twice argued; once before my three learned brothers, and afterwards before the whole Court; the last argument was at the sittings before the present term. Two points were made in the argument: first, whether the plaintiffs could have recovered back the money which they paid on the bills in question, supposing they had not struck out the indorsements subsequent to the names of *A. Heywood*, Sons and Co., on whose account they paid the bills; and second, whether their right to recover was defeated by that act. Upon the first point the cases of *Jones* v. *Ryde* (*a*) and *Bruce* v. *Bruce* (*b*), were cited for the plaintiffs; and *Price* v. *Neale* (*c*) and *Smith* v. *Mercer* (*d*), for the defendants. The general rule of law is clear, and has not been doubted, that money paid under a mistake of facts, may be recovered back as being paid without consideration. To this rule the two cases cited for the defendants are exceptions. The question is, if the present case is within the rule, or within the exceptions. The case of *Price* v. *Neale* was that of a person on whom two bills of exchange, falling due at different times, were drawn. He paid the first bill when presented at maturity, not having accepted it; and he accepted and paid the second bill. This was all done under a mistaken opinion that the signature of the supposed drawer was genuine. Some time afterwards it was discovered that the signature of the drawer was forged. The decision of Lord *Mansfield* against the plaintiff in that case, appears not to have been grounded on

(*a*) 5 Taunt. 488.
(*b*) Id. 595.
(*c*) 3 Burr. 1354.
(*d*) 6 Taunt. 76.

the delay, but upon the general principle that an acceptor is bound to know the hand-writing of the drawer, and that it is rather by his fault and negligence, than by mistake, if he pays on a forged signature. The other case of *Smith* v. *Mercer* was the case of bankers, at whose house a bill was presented for payment, purporting to be accepted by one of their customers. The forgery of the acceptor's name was not discovered until the end of a week. In that case Mr. Justice *Chambre* thought the plaintiffs were entitled to recover; the other learned Judges were of a different opinion. Mr. Justice *Dallas* appears to have founded his judgment, principally, upon the supposed fault or neglect of the plaintiffs, who ought to have known the signature of their customer; though he also notices the delay, and the inconvenience that might thereby result to the holders of the bill. Mr. Justice *Heath* appears to have given his judgment entirely on account of the default and neglect of the plaintiffs, who could not, he thought, be in a different situation from that in which their customer would have stood if he paid the bill himself. Lord Chief Justice *Gibbs* grounds his judgment on the delay, as sufficient for the detection of the forgery, but at the same time declares that he does not thereby mean to express his dissent from the larger ground on which the case had been put by the other two Judges. Now if we come to compare the facts of the present case with those of the two cases before mentioned, we shall find some important difference. The plaintiffs were not the drawers or acceptors of the bills, nor the agents of the supposed acceptor. They discovered their mistake on the morning of the day on which they made the payment, and they gave notice of their discovery to the defendants in time to enable them to give notice of the dishonour to the prior parties, which was given accordingly. The plaintiffs were called upon to pay for the honour of *A. Heywood*, Sons and Co., whose names appeared on the bills, among other indorsements; and the very act of calling upon them in this character was calculated in some degree

to lessen their attention. A bill is carried for payment to the person whose name appears upon it as acceptor, or as the agent of the acceptor, entirely as a matter of course. The person presenting it very often knows nothing of the acceptor, but merely carries or sends the bill according to the direction he finds on it; so that the act of presenting it informs the acceptor or his agent merely that his name appears on the bill as the person to pay it; and it is then for him to see that his name is properly on the bill. But it is by no means a matter of course to call upon a person to pay a bill for the honour of an indorser; and such a call, therefore, imports, on the part of the person who makes it, that the name of the correspondent, for whose honour payment is requested, is actually on the bill. Undoubtedly the person so called upon ought to satisfy himself that the name of his correspondent is really on the bill; but his attention may reasonably be lessened by the assertion that the call itself makes to him *in fact*, although no assertion be made *in words*. The fault, if he pays on a forged signature, is not exclusively his own, but begins, at least, with the person who thus calls upon him for payment; and though, where all the negligence is on one side, it may be unfit to examine into the quantum of it, yet where there is any default in the other party, that other party cannot be said to be wholly innocent, and ought not, in our opinion, to profit by the mistake, into which he may by his own prior mistake have led the other; at least if the mistake is discovered while the remedies of all the parties entitled to remedy are left open to them. It is not easy to reconcile the opinions of some of the Judges in *Smith* v. *Mercer*, with the prior judgment of the same Court in *Bruce* v. *Bruce*. That was the case of a forged victualling bill, the forgery consisting in the alteration and enlargement of the amount of it. When the bill was presented at the Victualling Office by the Bank of *England*, the whole sum was paid; but the forgery being discovered, the bank paid back the difference, and then called upon their customer, the plaintiff, who repaid the bank, and then

1824. WILKINSON v. JOHNSTON.

brought his action against the defendant, from whom he had received the bill in its forged state. Now if the payment of the whole sum at the Victualling Office could not by law be rescinded on the ground of mistake, then the refunding of part by the bank, and afterwards by the plaintiff, were acts done by those parties in their own wrong, and were consequently not binding upon the defendant, nor giving any right of action as against him. We think the present case approaches in principle nearer to that of *Bruce* v. *Bruce*, than to either of the other cases mentioned. We think the payment by the plaintiffs in this case was a payment by mistake, and without consideration, to a person not wholly free from blame, who ought not, in our opinion, to retain the money, unless the act of erasing the names of the other indorsers will have the effect of discharging them, and so deprive the defendants of their right to resort to them. This brings me to the second point in this case, and upon that we are clearly of opinion that the defendants have not been deprived of their right of resorting to the other indorsers. The striking out the indorsements by mistake cannot, in our opinion, discharge the indorsers; it would, as it seems to us, be most mischievous to commerce to hold that it could. In the case of *Fernandez* v. *Glyn* and others (*a*), which was tried before Lord Chief Justice *Ellenborough* at *Guildhall* at the sittings after *Michaelmas* Term, 1806, it appeared that a check drawn upon the defendants, who were bankers in the city of *London*, by one of their customers, passed through the clearing house, and was taken from thence to the defendants' shop, by one of their own clerks, where another of their clerks drew his pen through the name of the drawer, as was usual when a check was intended to be paid. But it being found afterwards that a check for a very large amount, drawn by a third person, and paid into the defendants' house by the drawer of this check, had been dishonoured, the same clerk wrote under the name the words "cancelled by mistake," and signed his initials, and in that

(*a*) 1 Camp. 426. in notis.

1824.
WILKINSON v. JOHNSTON.

state the check was, before five o'clock, returned to the bankers to whom the plaintiff had delivered it, and was received back by them. It was contended on behalf of the plaintiff, that this cancellation amounted to an acceptance of the check, or an acknowledgment that the defendants had money in their hands to pay it, and was irrevocable. It was proved, however, to be usual to return and take back, before five o'clock, checks not intended to be paid, and which had passed through the clearing house, and had been so cancelled, if the words "cancelled by mistake" were written on them; and the plaintiff was nonsuited. Now that case shews that the act of drawing a pen through a name on such instruments, is not considered among mercantile men so absolute in itself, as not to be recalled or annulled, if done by mistake. In the present case we think that the mistake may be shewn, and that the indorsers are not discharged. If it should hereafter turn out that the defendants are put to additional expense, by extra proof or otherwise, on account of this improvident act of the plaintiffs, they may possibly maintain a special action on the case, to recover compensation to the extent of the injury they may have sustained; but this does not extend necessarily to the whole consideration, and if not, it furnishes no defence to the present action. For these reasons we are of opinion that the verdict in this case ought to be entered for the plaintiffs.

Postea to the plaintiffs.

The KING v. TREMAINE.

Saturday, November 27.

Where a Judge at the assizes refused to try an indictment for a misdemeanor, manifestly bad on the face of it, but did not order it to be quashed, and the prosecutor preferred another indictment for the same offence, and removed it into K. B., the Court would not call upon the prosecutor to pay the costs of the first prosecution, before he proceeded with the second.

ON the last Western Circuit the defendant had been indicted on the crown side for a misdemeanor. When the case

1824.

The King v. Tremaine.

was called on for trial, *Garrow*, B. refused to try it, the indictment being manifestly defective in form, but the learned Judge did not order it to be quashed. The prosecutor then preferred a second indictment for the same alleged offence, and having removed it into this Court by certiorari,

Carter now moved for a rule, calling on the prosecutor to shew cause why he should not pay the defendant his costs incurred by the first prosecution, before he was permitted to proceed with the second. It is an established rule in this Court, that where a first indictment is quashed the Court will not allow the prosecutor to prefer a second for the same offence, but on the condition of paying the costs of the first. Here undoubtedly the first indictment was not quashed, and it still remained on the file; but as the learned Judge had refused to try it because it was so defective that it could not be supported for a moment, the case comes within the spirit of the rule, where the first indictment is in fact quashed. No express decision can be found on the point.

Abbott, C. J.—Unless some instance can be found in which such an application has been granted under similar circumstances, I think we ought not to establish a precedent.

Per Curiam. Rule refused.

Saturday, November 27.

The King *v.* The Mayor and Burgesses of the Borough of West Looe.

Where the charter of a corporation declared that "it shall be lawful for the mayor and capital burgesses to remove any of their body for non-residence within the borough:"—Held, that this gave them a discretionary, and not a compulsory, power of amotion.

WILDE, Sergeant, moved for a rule to shew cause why a writ of mandamus should not issue, directed to the Mayor and Aldermen of the Borough of *West Looe*, in the county of *Cornwall*, commanding them to assemble themselves to-

1824.

The King v. The Mayor and Burgesses of West Looe.

gether within the borough, and consider of the propriety of removing certain persons by name, from the office of a capital burgess on the ground of non-residence within the said borough. The corporation of *West Looe* consists of a mayor and twelve capital burgesses, with power of making bye laws, and of removing any of their body for any offence, or default, or reasonable cause, &c. The affidavits in support of the motion alleged, that for the last ten years, five only of the capital burgesses had been resident within the borough, and that the remainder resided wholly out of the borough, some at a very considerable distance, and in one instance, the party resided permanently in *India*. No inconvenience was stated to result to the inhabitants from the non-residence of the capital burgesses, but it was contended that, inasmuch as by the charter the mayor is to be selected annually out of the resident capital burgesses, and as that number consisted now but of five, it was impossible to exercise the fair right of selection. The learned Sergeant adverted to the late case of *Rex* v. *The Mayor of Portsmouth* (a), and submitted that the principle on which that case was decided, ought not to govern the present case. The Court cannot speculate upon the question of convenience or inconvenience resulting to the inhabitants of a borough from the non-residence of its capital burgesses. If residence be the condition on which a capital burgess holds his office, and that condition be broken, it is a sufficient ground of amotion. Here the crown by its charter imposes residence as the condition of holding the office, and it has vested in the capital burgesses, the power of removing its non-resident members. That power has not been exercised in the present instance, and the only mode of setting the mayor and capital burgesses in motion is by mandamus.

Abbott, C. J.—I am of opinion that we cannot grant a mandamus in the present case, and that opinion is grounded upon the terms of the charter which gives the power of

(a) Ante, vol. iv. 767.

1824. The King v. The Mayor, and Burgesses of West Looe.

amotion. The charter says "It shall be lawful for the mayor and the rest of the capital burgesses for the time being, to remove any capital burgess for any offence, or default, or reasonable cause, at the discretion of the mayor and the rest of the capital burgesses of the borough for the time being, or the greater part of them, &c." It has never been thought, or even suggested, that, under such words, this Court has authority to interfere, and order the removal of non-resident capital burgesses; for that is the effect of the present application. In the case of *Rex* v. *The Mayor of Portsmouth*, the effect of similar words in the *Portsmouth* charter was under our consideration, and we thought we could not exercise the authority which we were then called upon to exercise, namely, to command the removal of the non-resident aldermen. That was our opinion then, and we are of the same opinion still. If we were to interfere in the manner now desired, we should be usurping a power which does not belong to us. No injury is suggested as resulting to the inhabitants from the non-residence complained of. If there had been any mismanagement or misgovernment of the borough arising from this cause, that would be a different thing, but we have no authority to interfere on the ground now suggested.

Bayley, J.—I am of the same opinion. I took no part in the decision of *Rex* v. *The Mayor of Portsmouth*, but I concur entirely in the principle on which that case was decided. The impression on my mind is, that there may be many cases in which the non-residence of certain members of a corporation will work no mischief to the body of the corporation at large. If a capital burgess does not reside within the immediate limits of the borough, that will not render his holding the office incompatible, provided he resides within such a convenient distance as will enable him to discharge the duties of his office. Non-residence, in the strict sense of the word, would be a ground of disqualification in a great many boroughs; but though a party may be

1824. The King v. The Mayor and Burgesses of West Looe.

literally non-resident, that is, does not dwell within the borough, yet if he resides within such a distance as will allow him to discharge his corporation duties, a reasonable interpretation of the word must be admitted. Where a charter says "it shall be lawful for the mayor and capital burgesses to remove for non-residence," I think that gives them a discretionary power to remove or not, as they shall think fit, and does not render it compulsory on them absolutely to remove for non-residence.

Holroyd, J.—The words "it shall be lawful for them, &c." certainly are very strong, but still it is for the consideration of the mayor and burgesses, whether they will or will not take steps towards removing a non-resident.

Littledale, J. was absent.

Rule refused. (a)

(a) *Vide* Cowp. 530; Carth. 227; 4 Mod. 33; Holt. 435; 2 T. R. 772; 2 Lord Raym. 1275; Ca. temp. Hard. 147; 4 Burr. 2087; 1 Ves. jun. 1; *Rex* v. *Hastings*, ante, vol. i. 148; *Rex* v. *Havering Atte Bower*, ante, vol. ii. 176; and *Rex* v. *Eye*, id. 172.

Cuxon and another, Assignees of T. Sweet, a Bankrupt, v. James Chadley.

Saturday, November 27.

A. and *B.* are respectively indebted to *C.* and *B.* is also indebted to *A.*; *C.* agrees with *B.* to transfer *A.'s* debt to his (*B.'s*) account which he does by charging in an account delivered, the sum due to him from *A.*:—Held, that by this arrangement *A.'s* liability to pay *C.* was not discharged

THIS was an action for goods sold and delivered by the bankrupt to the defendant before bankruptcy. Plea, non assumpsit, and issue thereon. At the trial before *Abbott*, C.J. at the *London* Adjourned Sittings after last *Hilary* Term, the case was this:—In *May*, 1822, the bankrupt sold some upholstery goods to the defendant to the amount of 14*l.* 1*s.* The bankrupt and *Robert Chadley*, the brother of the defendant, had been concerned together in accommodation bill transactions, and there was another account between

1824. CUXON v. CHADLEY.

them for goods, in which *Robert Chadley* was indebted to the bankrupt. In *September*, 1822, *Robert Chadley* spoke to *Sweet* and desired him to put down to his account the goods which had been sold to the defendant. This, the bankrupt agreed to do, and *Robert Chadley* informed the defendant what had passed between them. At this time *Robert Chadley* was indebted to the defendant to the amount of about 50*l*. Towards the end of the year when the bankrupt gave in an account of the monies due to him from *Robert Chadley* he put down in his own handwriting at the end of the account this entry. "*December* 1st, 1822, your brother's account 14*l*. 1*s*." Nothing more appeared to have passed between the parties. No application had ever been made by the bankrupt to *Robert Chadley* for the money, and it appeared that by charging the amount to the latter, the account between him and the bankrupt would have been nearly balanced. *Sweet* became a bankrupt on the 15th *February*, 1823. The question was, whether under these circumstances the defendant was not discharged from his liability. The Lord Chief Justice was of opinion that the defendant was not discharged, and therefore directed the jury to find a verdict for the plaintiffs, with liberty, however, to the defendant to move to enter a nonsuit.

Gurney having obtained a rule nisi in *Easter* Term to enter a nonsuit,

Marryat (with whom was *Reader*) now shewed cause. The question is whether by what has been done in this case, the defendant is discharged from the debt which he had contracted with the bankrupt *Sweet*. It is clear first that the bankrupt gave the credit to the defendant, to whom the goods had been delivered; and second, that the goods have never been paid for. Admitting the bankrupt to have made the entry relied upon on the other side, by the direction of *Robert Chadley*, still the defendant could not avail himself of it to discharge his liability, unless it appeared that the

1824. Cuxon v. Chadley.

bankrupt had in express terms released him from all liability. Supposing the agreement amounted to accord, still there was clearly no satisfaction, and it cannot be considered as a discharge of the defendant's liability at all events. *Robert Chadley* was under no legal obligation to pay his brother's debt, for even if there had been a promise to pay the debt, still as it was not made in writing, it would be void by the statute of frauds. The fact that the bankrupt had merely added at the bottom of his account against *Robert Chadley* the sum which the defendant owed him, could not amount to a discharge, unless something was done afterwards to manifest the bankrupt's intention of releasing the defendant. Undoubtedly, if *Robert Chadley* had afterwards paid the defendant's debt, the bankrupt could not have sued the defendant, because that would have been a complete discharge. The case of *Wyatt* v. *The Marquis of Hertford* (a) is much stronger than this, because there the plaintiff had done work for the defendant, and after it was completed sent in his account to the defendant's steward, and accepted from the latter his draft in payment, and gave a receipt for the money. The draft being dishonoured, the plaintiff, without making any representation to the defendant, took from the steward a second draft payable at a future day. The second draft was also dishonoured, and the steward becoming insolvent, the plaintiff applied to the defendant for payment, which was refused, and in that case it was laid down that if one take the security of the agent of the principal with whom he deals, unknown to the principal, and give the agent a receipt for the money due from the principal, in consequence of which the principal deals differently with his agent on the faith of such receipt, the principal is discharged, although the security fail; but that it would be otherwise if the principal failed to shew that he was injured by means of such false voucher, and the omission of the party to inform him of the truth in due time. Now, admitting *Robert Chadley* to have been agent for the defendant for the purpose of

(a) 3 East, 147.

1824.

CUXON v. CHADLEY.

paying this debt, still the case referred to is an authority to shew that the defendant remained liable to the bankrupt, unless it was made apparent that, in consequence of the sum due from the defendant having been transferred to *Robert Chadley's* account, the defendant had been induced to deal in a different manner with his brother, on the presumption that the demand had been satisfied. But here there is no evidence whatever to shew that the dealings between the parties were at all altered by the arrangement. The bankrupt derived no benefit from it, nor is the defendant injured by it. The utmost that it amounts to, is an agreement to transfer the debt, but there is no satisfaction of it. There being no obligation on the part of *Robert Chadley* to pay his brother's debt, there is no sufficient consideration moving the bankrupt to discharge the defendant. There is not indeed any privity between the bankrupt and the defendant, for it does not appear that the defendant ever communicated with the bankrupt upon the subject. All that the case amounts to is this; *Robert Chadley* says to the bankrupt, " place my brother's debt to my account," and the bankrupt consents so to do, but this was no discharge of the defendant's original liability.

Gurney (with whom was *Holt*) contrà. The agreement between the parties in this case amounts in substance and legal effect to an accord and satisfaction. It is an agreement on the part of the bankrupt to accept *Robert Chadley* as his debtor instead of the defendant. This agreement is in fact acted upon, because the bankrupt actually transfers the defendant's debt to *Robert Chadley's* account. It is not necessary that the defendant should be personally privy to this arrangement. It is sufficient, as the fact was, that it was afterwards communicated to the defendant, and that he approved of it. Upon the footing of this arrangement, the relative rights of the two brothers were materially altered, because the defendant was thereby induced to forego any remedy which he might have against his brother *Robert* for

the debt due from him, in consideration of the bankrupt agreeing to accept his brother as his debtor. The account stated between the bankrupt and *Robert Chadley* was a ratification of the previous agreement, by which the bankrupt consented to discharge the defendant by substituting *Robert* in his place. Here the bankrupt, with full knowledge of all the circumstances, consents to accept *Robert* instead of *James* as his debtor, and acting upon that arrangement, charges *Robert* with the amount. In substance therefore, the agreement is tantamount to an accord and satisfaction, and the bankrupt having adopted *Robert* as his debtor he has discharged the defendant's liability.

The case was argued on a former day, and the Court having taken time to consider of the case, judgment was now delivered by

ABBOTT, C. J.—We are of opinion that the rule for entering a nonsuit must be discharged. The facts of this case have been so recently before us, that it is unnecessary to enter into much detail. It appears that *Sweet*, the bankrupt, had sold goods to the amount of 14*l.* 1*s.* to *James Chadley*, the defendant. *Sweet* and *Robert Chadley*, the brother of the defendant, were concerned together in accommodation bills, and independently of that there was another account between them, in which *Robert Chadley* was debtor to *Sweet*. *Robert Chadley* was also debtor to his brother *James*, who resided out of *London*. About the month of *August* or *September*, *Robert Chadley* spoke to *Sweet*, and desired that he would put down the goods which had been sold to *James Chadley*, to the account of him, *Robert*. *Sweet* agreed to do this, and the next time *Robert Chadley* saw his brother *James*, he informed him what *Sweet* had said. This, however, was not done until towards the end of the year, when *Sweet* gave in an account of the money due to him from *Robert Chadley*, and then he put at the end of the account this entry; "*December* 1st, 1822, Your brother's account, 14*l.* 1*s.*" This is all that passed between

1824.

CUXON *v.* CHADLEY.

the three parties. *Sweet* is not proved ever to have said, "I will take you *Robert* as my debtor, and discharge *James*;" he is not proved ever to have said or done that which would have the effect of discharging *James*. It was contended by the defendant's counsel that this was accord and satisfaction; but admitting the previous agreement to have existed, what proof is there of any satisfaction? None whatever. We consider the entry made by *Sweet* to mean no more than this, "I will debit the account of *Robert* for 14*l.* 1*s.*;"—but not, "I will discharge *James* at all events from this sum." The dealings between the parties were not at all varied by this arrangement. The bankrupt's condition was not improved by it, nor was the defendant's injured. It amounted at the utmost to an accord, but certainly not to a satisfaction. Upon the whole of the case, therefore, we cannot say that either *Robert* could have been made to pay this money to *Sweet*, if he had been called upon for it, or that *James* is discharged from that obligation originally entered into to pay the amount of the goods sold to him by the plaintiff. We therefore think that the verdict was right, and that the rule ought to be discharged.

Rule discharged.

The KING *v.* JOSIAH TAYLOR.

Monday, November 29.

Indictment, that defendant in the reign of the *present* king kept a common gaming house. Plea, that defendant in the reign of the *present* king was acquitted upon an indictment for keeping a common gaming house in the reign of the *late* king, against the peace of our *said* lord the king; and averring the identity of the offences. Demurrer, concluding with a prayer of judgment of respondeas ouster:—Held, first, that the plea was bad, because the indictment on which the acquittal was founded, charged an offence committed in the reign of the *late* king, and defendant could not by averment shew that the offence charged in both indictments was the same; and second, that the judgment on demurrer was final, although the demurrer concluded with a prayer of judgment of respondeas ouster. *Semble*, that every indictment for a misdemeanor must conclude contrà pacem, &c.

INDICTMENT charging that defendant, on the 20th day of *April*, in the second year of the reign of *our sovereign Lord George the Fourth*, &c. and on divers other days and

times between that day and the day of the taking of this inquisition, with force and arms, at &c. a certain common gaming house, for his lucre and gain, unlawfully and injuriously did keep and maintain, &c. Plea, in bar, that heretofore, to wit, at the General Quarter Session of the peace of *our Lord the King*, begun and holden at &c. on *Wednesday* the 15th day of *October*, in the fourth year of the reign of *our sovereign Lord George the Fourth*, &c. before &c. and continued &c. until *Monday* the 20th day of the same month of *October*, he, the said *J. T.* was duly arraigned upon a certain indictment before then, to wit, at the General Session of the peace of *our said Lord the King*, holden in &c. on *Monday* the 8th day of *September*, in the fourth year aforesaid, duly presented and found, &c. which charged that he, the said *J. T.* on the 18th day of *January, in the 57th year of the reign of our late sovereign Lord George the Third*, &c. and on divers other days and times between that day and the day of the taking of that inquisition, with force and arms, at &c. aforesaid, a certain common gaming house, for his lucre and gain, unlawfully and injuriously did keep and maintain, &c. *against the peace of our said Lord the King*, his crown and dignity. To which said indictment he, the said *J. T.* had before, to wit, at the preceding General Session of the peace of *our said Lord the King*, holden &c. on *Monday* the 8th day of *September*, in the fourth year aforesaid, pleaded that he was not guilty, upon which plea issue had been joined; and thereupon a jury of the country then and there, to wit, at the General Quarter Session of the peace of *our said Lord the King*, holden at &c. on *Monday* the 20th day of *October*, as aforesaid, duly chosen, &c. did then and there, upon their oath, say that the said *J. T.* was not guilty of the nuisance in the said indictment aforesaid above specified, upon which it was considered by the Court there, that the said *J. T.* of the premises aforesaid, in the said last mentioned indictment above specified, should be discharged and go without day, as appears by the record of the said proceedings now remaining in the said Court of General

1824. The KING v. TAYLOR.

Quarter Session of the peace of *our said Lord the King*, &c. And the said *J. T.* further saith, that he, the said *J. T.* now here pleading, and the said *J. T.* in the aforesaid indictment named, and thereof acquitted as aforesaid, was and is the same identical person, and not other or different persons, and that the said nuisances and offences, in the said indictment, to which he, the said *J. T.* now here pleads, specified, and the supposed nuisances and offences specified in the said indictment of which he, the said *J. T.* was and is so acquitted as aforesaid, are the same supposed nuisances and offences, and not other or different nuisances and offences, to wit, at &c., and this he, the said *J. T.* is ready to verify: wherefore &c. Demurrer to the plea, praying judgment of respondeas ouster, and joinder in demurrer. The case was argued at the Sittings after last *Trinity* Term.

Chitty, in support of the demurrer. There are several objections to this plea, but one of them in particular is so clearly fatal, that it will be sufficient, in the first instance, to direct the attention of the Court to that only. The indictment set out in the plea, and upon which the supposed acquittal is founded, is one upon which no sentence could have been passed, because it charges the defendant with an offence committed in the reign of *George the Third*, and concludes against the peace of *George the Fourth*. Such an indictment cannot be supported, and therefore the plea in which it is set out is bad. In *Rex* v. *Lookup* (*a*), the question being put by the House of Lords to the twelve Judges, "whether the perjury being alleged in the indictment to have been committed in the time of the late king, and charged to be against the peace of the now king, was fatal, and rendered the indictment insufficient;" the Lord Chief Baron delivered the unanimous opinion of the Judges in the affirmative. That is a direct and decisive authority for the present case, and the same rule is laid down by Lord

(*a*) 3 Burr. 1901

Hale (a), and Mr. Serjt. *Hawkins* (b). If the indictment was intended to cover offences committed in both reigns, it should have concluded against the peace of both kings: *Winter's* case (c), and *Incledon* v. *Burgess* (d). Besides, it is plain that there are two distinct offences charged in the two indictments; for the first charges an offence committed in the reign of *George the Third*, and the present charges an offence committed in the reign of *George the Fourth*; they cannot therefore, by possibility, refer to one and the same offence. Lastly, the conclusion contrà pacem cannot be treated as surplusage, for it is substance, and its omission altogether would be fatal: *Palfrey's* case (e), and *Leyton's* case (f).

Curwood, contrà. It may be admitted, that in a plea of autrefois acquit it is necessary to set out all that is essential to shew that the defendant was legitimo modo acquietatus; but that is all: and therefore, if a statement of the particular time at which the acquittal took place was not necessary for that purpose, this objection will not be fatal to the plea. Now it is not an inflexible or invariable rule that the allegation contrà pacem must be inserted in an indictment; *Regina* v. *Wyatt* (g), and an anonymous case in *Ventris* (h). Here the averment that the defendant was acquitted at a Quarter Session of the peace of the present king (reading the plea so) is sufficient, because it has reference to the then reigning monarch at the time when the plea was pleaded. This argument will be fully illustrated by recurring to the principle upon which this allegation has been held necessary at all, which was, to shew that the king was entitled to certain forfeitures consequent upon any act which constituted a breach of his peace; and this became necessary, because if the breach of the peace occurred within

(a) 2 Hale's P. C. 188, 9. (b) Curwood's Hawk. P. C. b. 2. c. 25. s. 92.
(c) Yelv. 66. (d) 2 Salk. 636.
(e) Cro. Jac. 527. (f) Cro. Car. 584.
(g) 1 Salk. 380. (h) 1 Ventr. 108, 111.

1824. The King v. Taylor.

a manor or franchise, and this allegation were omitted in the indictment, the lord of the manor or franchise, and not the king, would be entitled to the forfeiture: 27 *H.* 8. c. 24. s. 4. But in the present case no forfeiture is attached to the offence charged by the indictment; therefore the object of the allegation is not involved, and the principle does not apply; the allegation, consequently, might have been omitted altogether, and, according to the case, already cited, of *Regina* v. *Wyatt*, "was surplusage, and could do neither good nor harm." [*Bayley*, J. "Because," it is added in the report, "it was a nonfeasance;" this is an indictment for a misfeasance; therefore the argument does not apply.] The offence charged by this indictment cannot, perhaps, in the full sense of the word, be called a nonfeasance; for, generally speaking, a nuisance is a misfeasance. But there are wide and important distinctions between nuisances of different kinds; and, according to the authorities upon that point, the nuisance charged in this indictment seems to be one that ranges under the class of nonfeasances rather than of misfeasances: 2 Rol. Abr. tit. *Indictment, Chose de Form*, G. and *Holmes's* case (*a*). In the first place, therefore, the allegation, "contrà pacem," was not necessary at all in this plea; and in the second, even if it were necessary, still, as the allegation has reference plainly to the reign of the present king, and the plea was pleaded during his reign, there is no variance or uncertainty attached to it, because it must be construed according to the plain and ordinary meaning of the context, which shews the acquittal to have taken place during the present king's reign.

Abbott, C. J.—I am of opinion that this plea is bad in form, and that judgment must be given for the crown on demurrer. A plea of autrefois acquit must set out the indictment upon which the acquittal took place, and must shew it to have been such an indictment in correctness, both of form and substance, as would have been sufficient to

(*a*) Cro. Car. 377.

induce a punishment if the party had been convicted, and also that it was an indictment for the same offence as that charged by that indictment to which the acquittal is pleaded. If the offences charged by the two indictments are not the same, no averments in the plea can make them so. It is not necessary in this case to decide whether the omission of the conclusion, "contrà pacem," would or would not have been fatal to the first indictment, though I have no hesitation in saying that the present strong inclination of my opinion is, that it would. Reading it as it is set out in this plea, it appears that it charges all that was done, to have been done against the peace of our said Lord the King, which it is equally plain, from the other parts of it, was *George the Third*. Now the present is an indictment for an offence charged against the peace of *George the Fourth*, and therefore an acquittal upon the former cannot be any answer to the latter, they being for different offences, committed in different reigns.

Bayley, J.—If it were necessary to decide whether it was essential that the first indictment should conclude against the peace, the present impression of my mind is, that it was, and some very strong reasons for that impression may be found in *Hawkins*, lib. 2. c. 25. s. 92. But we are not called upon to decide that question, because as the offences charged by the two indictments are evidently not the same, the defendant has never before been put in jeopardy for the offence now charged against him, and therefore cannot set up an acquittal for a former and distinct offence in bar of an indictment for a subsequent one.

Holroyd, J.—I think that in an indictment like the present, the conclusion, contrà pacem, is necessary; but it is quite clear, that on the trial of the first indictment the prosecutor's evidence must have been confined to offences committed in the reign of *George the Third*; therefore the two indictments charge two distinct offences, and an acquittal under one is no defence to the other (a).

(a) *Littledale*, J. was absent.

1824.

The KING v. TAYLOR.

Some doubt having subsequently been raised whether the Court should pronounce final judgment for the crown, or only judgment of respondeas ouster, the case was directed to be argued again upon that point; accordingly, on a former day in this term, the case again came on for argument.

Chitty, for the crown. The Court must enter final judgment against the defendant. All the authorities concur in shewing that a plea of autrefois acquit is a plea in bar, and not a plea in abatement (*a*). Had this been a plea in abatement, the defendant might have been entitled to judgment of respondeas ouster, though it has been decided that in cases of misdemeanor, where issue is taken upon a plea in abatement, and is found against the defendant, the judgment is final; *Eichorn* v. *Le Maitre* (*b*), and *Rex* v. *Gibson* (*c*). If judgment be given against a defendant on demurrer to a plea in abatement in cases of misdemeanor, the judgment is respondeas ouster, and not final; but the judgment on a demurrer to a plea in bar, is final; *Bowen* v. *Shapcott* (*d*). Had the plea been autrefois convict, or a pardon, it is quite clear that the defendant would not have been entitled to answer over; for though in cases of felony, if such pleas are found against him, a defendant may have judgment of respondeas ouster, in cases of misdemeanor the judgment is final, and the Court may proceed to pass sentence as upon a conviction (*e*). But that distinction is taken only in favorem vitæ (*f*), and does not apply to cases of misdemeanor; for there the rule is the same as it is in civil cases; *Regina* v. *Goddard* (*g*).

Brodrick, for the defendant. This question is res integra, and as it is of vital importance to the public, demands the most careful consideration of the Court. No case has been

(*a*) 2 Hale's P. C. 241; Hawk. P. C. b. 2. c. 35; Com. Dig. Indictment, L.; 4 Bl. Com. 335, 6; 2 Burn, Indictment, XI.; 4 Rep. 45.

(*b*) 2 Wils. 367. (*c*) 8 East, 107. (*d*) 1 East, 541.

(*e*) 2 Hale's P. C. 256. (*f*) 2 Hale's P. C. 239, 247.

(*g*) 2 Ld. Rd. 923. See 1 Chitty's C. L. 451, 463, 470, and the authorities there collected on this subject.

cited, nor can any be found, which furnishes an authority for saying, that the present defendant must be concluded by the judgment given against him on the demurrer to his plea. The books certainly contain dicta bearing upon the subject, but there has never yet been an express decision on the point. In cases of felony it is admitted that the defendant may plead over after an issue on a plea in abatement has been found against him; and it has been repeatedly decided that he is entitled to the same privilege after judgment has been given against him on a plea of autrefois acquit. *Rex* v. *Vandercomb* and *Abbott*(a) and *Rex* v. *Coogan*(b). It is said, and truly, that this is done in favorem vitæ; but how are those words to be construed? Not as confining the rule to cases of actual life and death, because the privilege has always been extended to all felonies, clergyable as well as capital; but as applying it to all cases where the punishment consequent on conviction is severe. Now there are many misdemeanors which are much more severely punished than some clergyable felonies, and the present may fairly be considered as among the number; the sense and justice, therefore, is that the rule of practice in misdemeanors should follow that in felonies, instead of being assimilated to that in civil cases, where the defendant has originally the privilege of putting as many pleas on the record as he chuses. The cases already cited of *Eichorn* v. *Le Maitre*(c) and *Bowen* v. *Shapcott* (d) are authorities to shew that when the plaintiff has judgment on a demurrer to a plea in abatement, the defendant is at liberty to plead over, and for this conclusive reason, that "every man shall not be presumed to know the matter of law, which he leaves to the judgment of the Court." But that reasoning applies equally to pleas in bar, and applies also peculiarly to the present case. So there are cases of pleas to the jurisdiction, which cannot strictly be called pleas in abatement, because they go in bar of the whole proceeding, where the judgment on demurrer is

(a) 2 Leach, 708. 2 East's P. C. 519.
(b) 1 Leach, 448.
(c) 2 Wils. 367.
(d) 1 East, 542.

1824.
The King v. Taylor.

only judgment of respondeas ouster. In *Rex* v. *Johnson* (*a*) the defendant had judgment of respondeas ouster after a plea to the jurisdiction of all the Courts in *England* overruled on demurrer; and that was in substance and effect a plea in bar; and in *Rex* v. *The Earl of Devon* (*b*) the same rule seems to have been acted on. It is said that this plea resembles those of autrefois convict and pardon, and that as the judgment on demurrer to those pleas is final, it must be final here also. But there is a plain and important distinction; for by pleading a conviction or a pardon the party necessarily confesses his guilt, and therefore if he fails to establish a legal bar to the indictment, the judgment must of course be final, because there is then no issue of fact to try. A plea of acquittal, on the contrary, includes a denial of the party's guilt; and if by a technical error in pleading, which the defendant cannot be supposed to know of or to be able to prevent, he has lost his defence in law, it seems but just that he should resort to his defence in fact, and that he should at least have the chance of a trial, before he receives sentence and punishment. Lord *Holt*, it must be admitted, declared in *Regina* v. *Goddard* (*c*), "a man cannot plead over in any case but treason, or felony, and not in case of a misdemeanor;" that was, however, an extrajudicial dictum, for there was no question of pleading over then before the Court; and it was undoubtedly incorrect in some degree, because, even in cases of misdemeanor, it is quite plain that a man may plead over, after judgment on demurrer to a plea in abatement. Unless, therefore, a man is to be presumed guilty, and punished as guilty, because his legal defence is destroyed by a technical error, although his plea, which the demurrer admits to be true in fact, contains no admission of his guilt, but unequivocally denies it; the judgment in this case cannot be final, and the defendant is now entitled to plead de novo.

(*a*) 6 East, 583.
(*b*) 11 St. Tr. 1354. Tremayne's P. C. 188. 8 East, 110. note, S. C.
(*c*) 2 Ld. Rd. 920.

The Court took time to consider of their judgment, which was this day delivered by

Abbott, C. J.—This case originally came before the Court on a demurrer to a plea of autrefois acquit, and after argument the Court held the plea to be bad. It has again come before the Court in the present term, in order to its being decided what judgment ought to be given, whether judgment that the defendant do answer over, or final judgment. The indictment is for a misdemeanor in keeping a common gaming house, and the demurrer concludes with a prayer that the defendant do answer over to the indictment. The Court, however, is not bound by the prayer with which any part of the pleadings in bar may conclude, but is to give such judgment on the plea in bar as by law ought to be given. This was settled after argument and deliberation in the case of *Le Bret* v. *Papillon* (*a*), and confirmed afterwards by the case of *Rex* v. *Shakespeare* (*b*). If the demurrer in the present case had concluded with a prayer of judgment that the defendant be convicted, still the Court would only have given a judgment to answer over, if that had been by law the proper judgment. We are, therefore, to consider the question as a matter of law, entirely independent of the particular prayer that has been put upon the record. The plea is a plea, not in abatement, but in bar. The distinction between those pleas in civil actions is well known. If a plea in abatement is held bad on demurrer, the judgment is that the defendant do answer over; but if a plea in bar is held bad on demurrer, the judgment is general against the defendant: for the general rule, in civil actions at least, is, that a defendant is not to plead a second plea in bar, after the first has been determined against him. If he might do this, he might also plead a third, a fourth, and so on, and there would never be an end to the proceedings. It is to be seen whether this rule applies also to an indictment for a misdemeanor. Another rule in civil actions is, that if issue is

(*a*) 4 East, 502. (*b*) 10 East, 83.

1824

The King v. Taylor.

joined on a plea in abatement, and a verdict is found against the defendant, the jury who find the verdict assess the damages also, and the judgment recovered against the defendant is final, no further plea being allowed. The same rule applies to a plea in abatement to an indictment for a misdemeanor, if issue is joined thereon and found against the defendant. This was decided by the Court in the case of *Rex* v. *Gibson* (*a*). In this respect, therefore, the analogy between civil actions and indictments for misdemeanors is established by express decisions: but in felonies the rule is otherwise. "If a man plead any plea to an indictment or appeal of felony, that does not confess the felony, he shall yet plead over to the felony, *in favorem vitæ*; and that pleading over to the felony is neither a waiver of his special plea, nor makes his plea insufficient for doubleness. And, therefore, if he pleads any matter of fact to the writ or indictment, or pleads autrefois convict or autrefois acquit, he shall plead over to the felony; and although he doth it not upon his plea, but his plea be found or tried against him, yet he shall not be thereby convict without pleading to the felony, and trial thereupon." This is the first paragraph in the 33rd chapter of the second book of Lord *Hale's* Pleas of the Crown. The same learned author afterwards proceeds to speak of this subject in several passages, which I shall mention, as I think them material to our decision of this case. He says, that if he plead a plea that confesses the fact, as a release in an appeal, *in his opinion* he may, if he please, plead over to the felony, not guilty; and, accordingly, he says it was held by *Markham*, in 7 *Edward* 4. 15. a, though he refers to two later authorities to the contrary. He proceeds, if a man pleads the King's pardon, he shall not need to plead over to the felony, because it suits not with his plea; and yet, if the pardon upon a demurrer, or upon advisement of the Court, be adjudged insufficient, the party shall not thereupon be convict, but shall be put to plead to the felony, and be tried for it; the pleading of

(*a*) 8 East, 107.

1824.

The King v. Taylor.

the pardon is a kind of confession of the fact; but yet, *in favorem vitæ*, the party shall be put to answer the felony. The reason of the rule in these cases is expressly mentioned by that learned author, and repeated by all other writers on the subject: it is in favour of life. And these passages also shew that there is not any distinction subsisting between pleas in cases of felony which contain an admission of guilt, and those which import a denial of it; but the rule is the same in both cases, because the reason extends to both alike. It is well known that there is no felony at common law, except petty larceny, upon which judgment of death may not be given; nor any misdemeanor upon which such judgment can be given: and, therefore, the reason of the rule will not apply to the case of a misdemeanor. If the reason does not apply, the rule ought not to be extended to misdemeanors. Accordingly, in the second volume of Lord *Raymond's* Reports, page 921, Lord Chief Justice *Holt* plainly declared his opinion to be, that a man could not plead over in any case except treason or felony, and not in case of a misdemeanor. It is true that this point was not then in judgment before the Court, but nevertheless the opinion of so great a judge is entitled to very great respect. The only case which is supposed to be a decision in favour of the present, is that of the Earl of *Devonshire*, which is to be found in the 11 *Howell's* State Trials, 1353. I should be sorry to be thought to consider that case as an authority for any thing; but upon examination it will not be found applicable to the present question. The plea of the earl was not properly a plea in bar, for he pleaded that no peer of Parliament could be called upon to answer before any Court inferior to the Court of Parliament, for any misdemeanor during the sitting of Parliament, or the usual time before or after a prorogation; that the information was filed during the time of privilege; and he concluded by praying judgment whether the Court would or ought to take cognizance of the plea aforesaid, that is of the information, during the usual time of privilege. Upon this very special plea, which

1824.
The King v. Taylor.

was in the nature of a temporary plea to the jurisdiction, supposing the privilege to be disallowed, the proper, or at least the most lenient judgment would be, that the earl should answer to the information. That was the judgment in fact given. But that case cannot be considered as an authority upon the point now in question, and as the reason of the rule in cases of felony does not apply to cases of misdemeanor, and as it has been decided that the rule in civil actions does apply to cases of misdemeanor, where issue is joined on a plea in abatement; we are all of opinion that the rule in civil actions, and not the rule in cases of felony, applies to the present case, and, consequently, that the judgment against this defendant should be final, and not that he should answer over.

Judgment for the Crown.

The defendant was afterwards brought up for judgment, and received sentence.

Monday, November 29.

The King v. Tucker.

The 3 *Geo.* 4. c. 33. s. 2. gives a summary remedy, to the extent of 30*l.* against the hundred, for injuries done to property by riotous assemblies, on application to the Petty Sessions in the manner therein prescribed; and by s. 7. an appeal lies to the Quarter Sessions when persons are aggrieved by any thing done in pursuance of the act. Where the Petty Sessions, under a mistake of the law, and not upon the merits of the case, dismissed an application under this statute:—Held, that the Quarter Sessions might entertain an appeal against their determination. Service of a rule nisi for a mandamus to the Sessions to hear an appeal against the determination of the Petty Sessions, need not be upon the clerk of the peace; it is sufficient if it be served on the Justices whose decision is complained against.

BARNARD, on a former day in this Term, obtained a rule calling upon the defendant to shew cause why a writ of mandamus, issued in *Easter* Term last, directed to the Justices of the county of *Somerset*, commanding them to hear an appeal against the decision of the Special Petty Sessions for the hundred of *Winterstoke*, upon an application made by *Tucker* for a compensation in damages under the 3 *Geo.* 4. c. 33. should not be quashed, quia improvidè

emanavit. The case disclosed on affidavits was this:—On the 4th *November*, 1823, two ricks of corn, the property of Mr. *Tucker*, were wilfully consumed by fire in the hundred of *Winterstoke*, by some person or persons unknown. The value of the ricks was estimated at 30*l*., and in consequence of this injury he proceeded under the statute 3 *Geo.* 4. c. 33. (*a*), an act entitled "An Act for altering and amending several acts passed in the first and ninth years of the reign of King *George the First*, and in the forty-first, fifty-second, fifty-sixth, and fifty-seventh years of the reign of his late Majesty, King *George the Third*, so far as the same relate to the recovery of damages committed by riotous and tumultuous assemblies and unlawful and malicious offenders;" and gave the notice to the high constable thereby required; and, in pursuance of such notice, on the 9th *December* following, a Special Petty Session was holden by three justices acting for the hundred of *Winterstoke*, to hear and deter-

1824.

The King v. Tucker.

(*a*) By sect. 2. of which it is enacted, "That where the loss, injury or damage, claimed or alleged to have been sustained, shall not exceed in amount the sum of 30*l*., it shall and may be lawful for the party or parties dammified or injured, and he, she, and they, are hereby directed, within one calendar month next after such damage or injury shall have been sustained, to give notice in writing to the high constable of the hundred, &c. in which such loss, injury, or damage, shall have been suffered or sustained, of such riotous or tumultuous assembly having taken place, and the nature and amount of the loss, injury, or damage sustained, and of his, her, and their intention of calling upon the inhabitants of such hundred, &c. to make good such loss, injury, or damage; and the said high constable is forthwith to give notice in writing thereof to the magistrates residing in or acting for such hundred, &c., who shall thereupon appoint a Special Petty Session, to be holden within thirty days next after the receipt of such notice, of all the magistrates residing in or acting for such hundred, &c. to hear and determine of any complaint which may be then and there brought before them for or on account of any such damage or injury having been sustained by or through the means aforesaid; and the party or parties so damnified and injured, is, and are, hereby directed to give notice, or cause a notice in writing to be placed on the church or chapel doors, or most conspicuous place, of the parish, township, or place, in which such loss, injury, or damage, shall have been sustained, on two successive *Sundays* next preceding the day of holding such Petty Session, of the intent and purpose for which such Special Petty Session is to be held."

1824.

The KING v. TUCKER.

mine his complaint. After hearing the circumstances under which the fire took place, the justices, conceiving that it was necessary to prove that the persons who committed the injury were engaged in a riot or tumultuous assembly, or that they were armed with swords, fire-arms, or other offensive weapons, or had their faces blacked, or were otherwise disguised, and no such proof being given, dismissed the complaint. Whereupon Mr. *Tucker*, in pursuance of the 7th section (*a*) of the statute, entered an appeal at the *Epiphany* General Quarter Sessions holden for the county on the 12th *January* following. When the appeal came on to be heard, the Justices refused to entertain it, on the ground that nothing had been *done* by the Petty Sessions, in pursuance of the act, against which an appeal would lie, so as to give the Quarter Sessions jurisdiction, and therefore the appeal was dismissed. In *Easter* Term Mr. *Tucker* obtained a rule calling upon the *Somersetshire* Justices to shew cause why a mandamus should not issue commanding them to hear the appeal, upon notice of that rule to be given to the said Justices or some of them. On the last day of *Easter* Term the rule was made absolute, on an affidavit of service upon those Justices alone who had originally heard the complaint at the Special Petty Sessions, and upon the high constable of the hundred, and no cause being shewn, a mandamus was ordered to go, and the writ was served upon the same Justices only. When the appeal was presented for hearing at the *Midsummer* Quarter Sessions, the Justices then assembled refused to hear it, on an objection taken by the respondents' counsel that the rule nisi for the mandamus had been improperly served, not having been served upon more of the county Justices. Now, on shewing cause against the rule for quashing the writ of mandamus on the

(*a*) By which it is enacted, "That if any person or persons in *England* shall think himself, herself, or themselves, aggrieved by any thing done in pursuance of this act, such person or persons may appeal to the Justices of the Peace at their next General Quarter Sessions of the Peace to be holden for such county."

ground that it had been improvidently issued, two questions were raised; first, whether the General Quarter Sessions had jurisdiction to entertain an appeal under the 3 *Geo.* 4. c. 33. where the Petty Sessions had done nothing in pursuance of that act; and, second, whether the rule nisi for the mandamus had been properly served.

1824.
The King v. Tucker.

C. F. Williams shewed cause. It is clear that the Justices at the Special Petty Session, having mistaken their jurisdiction, their refusal to hear the complaint must be considered such a grievance to the party complaining of an injury for which the statute provided relief, as would give the Quarter Sessions jurisdiction to hear an appeal as for a thing done in pursuance of the act. If the Court shall not put this construction upon the statute, the party must be deprived of all remedy, because his complaint will be out of time. The statute contains very peculiar provisions. It requires that the party damnified shall give his notice within one calendar month next after the injury has been sustained, and the Petty Sessions are to be holden within thirty days next after the receipt of such notice, to hear and determine the complaint. Unless, therefore, the Quarter Sessions are bound to hear the appeal against the refusal of the Petty Sessions to entertain the complaint, the party will be deprived of all remedy. On this ground the mandamus properly issued. It may be true, as was said at Sessions, that the Justices had no original jurisdiction, but still they are empowered to remedy the grievance sustained in consequence of the mistake of the Petty Sessions. Then the only question is, whether the rule nisi for the mandamus was duly served. The rule nisi required that notice thereof should be given to the county Justices *or some of them.* Now that condition was fully complied with by serving it on the Justices composing the Petty Sessions, they being county Justices, and in fact the parties of whose proceedings complaint was made. It was also served on the high constable, who represented the hundred, and, therefore, due

1824.
The King
v.
Tucker.

notice was given to every necessary party interested in shewing cause, if any could be shewn. It would be unreasonable to expect a service of notice upon all the Justices of the county, and the service in this instance was in conformity with the usual practice in the Crown Office.

Jeremy, on the same side, was stopped by the Court.

Barnard, in support of the rule. The Quarter Sessions have no jurisdiction to hear an appeal under this act, unless the party has been aggrieved by something *done in pursuance of* the act. Now it would be an anomaly to say that the Petty Sessions have *done* any thing *in pursuance* of the act, when in fact they have refused to do any thing whatever. It is true that they heard the complaint, but being of opinion that the party had not brought his case within the remedy of the statute, they refused to make any order upon the subject, and dismissed the complaint. There was, therefore, nothing *done in pursuance* of the act which could give the Quarter Sessions jurisdiction to hear an appeal. It cannot be said that the dismissal of the complaint was an act done within the intent and meaning of the statute, for it would be a contradiction in terms to say, that they were acting in pursuance of the statute, when they refused to do any thing whatever under it. The application to the Quarter Sessions to hear what is called an appeal, was more in the nature of an application to exercise an original jurisdiction, than to set right any thing which had been improperly done by the Petty Sessions in pursuance of the statute. It is clear that the Quarter Sessions had no more a right to exercise an original jurisdiction in this case than they had to make a poor-rate, an order of removal under the poor laws, or an original order of filiation in a matter of bastardy. Theirs is only an appellate jurisdiction, to hear a complaint against something erroneously done by the Justices below. Here there was nothing to appeal against, and it might as well be said that they could entertain an appeal against the refusal

of Justices to impose a penalty, under a penal statute, at the suit of an informer. The question is, whether any act has been *done in pursuance of* the statute; for if nothing has been done, then the Sessions have no appellate jurisdiction. But, independently of this objection, the rule nisi for a mandamus having been improperly served, it ought not to have been made absolute, and therefore must be quashed on that ground. [*Abbott*, C. J. Upon whom do you say it ought to be served?] Upon the clerk of the peace, certainly. [*Abbott*, C. J. That had occurred to me to be requisite, but I find from the officers of the crown side that the practice is otherwise.—*Bayley*, J. According to the terms of the rule the notice is to be given to the Justices *or some of them*. Now here the service is upon the Justices who originally sat in Petty Sessions.] But that is a service upon parties who are utterly incompetent to act, because they are the persons against whose proceedings the mandamus is directed. [*Abbott*, C. J. I understand, from the officers on the crown side, that it is the common and constant course of practice to serve the rule nisi upon the particular magistrates whose act is complained of, and that it is not the practice to serve the rule on the clerk of the peace.—*Bayley*, J. Service upon the magistrates who were asembled at the Petty Sessions, was, I think, quite sufficient.—*Abbott*, C. J. Besides, here the high constable is served, and he represents the interest of the hundred.]

Abbott, C. J.—I think we ought not to quash this writ. If it appears that the rule nisi for a mandamus has been served according to the usual course and practice of the Court, the Justices cannot complain that the writ has issued improperly. We are informed, by the officers on the crown side, that the service of the rule in this case has been according to the constant course in similar cases. At the same time, however, if it could be shewn that the writ had issued improperly, and commanded the Justices at Sessions to do something which by law they had no power to do, it

1824.

The King v. Tucker.

would be the duty of the Court to quash it on the ground that it had been improvidently issued. Now it is very true, that in many cases if a Justice refuses to do a certain act, his refusal cannot be the ground of an appeal to the Sessions. For instance, if an application is made to Justices to make an order of filiation in a matter of bastardy, and they refuse to make it, their refusal cannot be made the ground of appeal. So with respect to orders of removal under the poor laws. But then in these cases a fresh application may be made to other justices, who may not refuse to act. Again, if there be a proceeding by information for a penalty under a statute, and the Justices, after hearing the matter, refuse to convict the party, that would be equivalent to an acquittal, and it is perfectly clear that no appeal will lie to the Quarter Sessions against an acquittal. But the authority given to the Justices under the 3 *Geo.* 4. c. 33. is one of a very peculiar and special nature. The party injured is within one month after the injury has been sustained, to give notice of the injury to the chief constable of the place, that he intends to call upon the inhabitants of the hundred to make good the loss. After the chief constable has received such notice, he is, on his part, to give a notice to the magistrates residing in, or acting for the hundred, who shall thereupon appoint a Special Petty Session, to be holden within thirty days next after the receipt of such last mentioned notice, of all the magistrates residing in, or acting for the hundred, to hear and determine the complaint, and the party injured is also to affix a notice on the church door on two successive *Sundays* next preceding the day of holding the Petty Session. The application, therefore, for relief, cannot be made to this or that justice, at the pleasure of the party, but must be made in such a manner as that all the justices acting for the division may assemble and decide, and the assemblage must be within thirty days after the high constable has received notice. If, therefore, the Justices in Petty Sessions dismiss the complaint, the party cannot renew his application for relief to other Justices, nor can this Court order a manda-

mus to the Special Petty Sessions. The question then is, whether, if the Justices at the Special Petty Sessions decide against the party complaining, not upon the merits of the case, but upon some opinion which they have formed of the law, which turns out to be erroneous, such determination or dismissal of the complaint is not an act done against which there may be an appeal under the 7th section of the statute. I think that it is so; but I wish it to be understood that our decision is founded on the special and peculiar provisions of this act of parliament, and is not to be drawn into a precedent in other cases of a general, and not of a peculiar nature, or where the circumstances are not similar, nor the law analogous. The ground of our decision is, that this was a dismissal of the complaint in consequence of a mistake of the law, and not a dismissal upon a hearing of the merits.

1824. The KING v. TUCKER.

BAYLEY, J. and HOLROYD, J. (a), were of the same opinion.

It then became a question whether the rule should be discharged with or without costs, and *Barnard* having informed the Court that he was instructed on behalf of the hundred—

The rule was discharged with costs, and a peremptory mandamus was ordered to go.

(a) *Littledale*, J. was gone to chambers.

WEATHERBY v. GORING.

Monday, November 29.

The Court will not change the venue, in an action on a specialty, before issue joined.

WIGHTMAN had obtained a rule for changing the venue in this case from *London* to *Lancashire*. The action was in covenant, on an indenture of apprenticeship. The defendant had not pleaded. The affidavit in support of the motion merely stated, that the cause of action, if any, arose

1824.

WEATHERBY v. GORING.

in *Lancashire,* and that all the witnesses resided in that county.

C. Cresswell, on shewing cause against the rule, contended, that as issue was not joined, and not even plea pleaded in the cause, the present application was made prematurely. At all events the defendant could not apply to change the venue without an affidavit stating that he had a good defence upon the merits; because, in the absence of such an affidavit, there was nothing to shew that he had any defence at all, or that he had any witnesses to examine.

ABBOTT, C. J.—This application is premature. A defendant is not entitled to change the venue in an action upon a specialty, unless he makes it appear clearly to the Court that he has a real defence, and some witnesses to examine in support of it. Until issue has been joined, the Court cannot possibly be informed upon those points; therefore, in the present case there was no proper ground for the motion, and the rule must be discharged.

Rule discharged.



Monday, November 29.

NEALE *v.* WYLLIE.

Where the assignee of an under lease containing a covenant to repair, suffered the premises to go out of repair, and the original lessor brought an action against the original lessee for the breach of a similar covenant contained in his lease:—Held, that the damages and costs of that action, and also, the costs of defending it, might be recovered as special damages in an action against the under-tenant for the breach of his covenant to repair.

THIS was an action of covenant upon an indenture of lease. The declaration stated a demise by indenture in 1804, of certain premises by the plaintiff to one *Finch* for eighteen years, wanting seven days, if one *Elizabeth Coppock* should so long live, which indenture contained a covenant to repair, and leave the premises in repair at the expiration of the term. It then stated that *Finch's* interest had become vested in the defendant by assignment, and that the defendant during the

term suffered the premises to be out of repair, and so left them at the expiration of the term in 1822, by reason whereof plaintiff, afterwards to wit, on &c. was forced and obliged to pay and did pay to the said *Elizabeth Coppock*, (by whom the premises had been demised to plaintiff for a longer term, before he granted the lease to *Finch*,) the sum of 10*l*. as and for damages for the bad state of repair of the premises, and also 100*l*. for the costs of an action brought against him by *Elizabeth Coppock* to recover those damages, and whereby also he was put to the further expense of 100*l*. in defending that action. The defendant having suffered judgment by default, a writ of inquiry was executed by the sheriff. It was proved in evidence that at the time the defendant's term expired the premises were left out of repair. Evidence was also given that the plaintiff was tenant of the premises under a lease granted to him in 1801, in which there was a covenant to repair. In consequence of the premises having been left out of repair by the defendant, Mrs. *Coppock* brought an action against the plaintiff upon the covenant, and recovered 10*l*. damages, and costs to the amount of 57*l*. The plaintiff's own costs in defending the action amounted to 48*l*. In this action the plaintiff sought to recover the costs so incurred as special damage; the jury, however, assessed the damages at 10*l*. only, the sum which had been recovered by Mrs. *Coppock*, and the question now was, whether the jury ought not to have included in their damages, the costs of the action brought by Mrs. *Coppock*, and the plaintiff's own costs in defending the suit.

Hutchinson, for the defendant. The jury have properly assessed the damages at 10*l*. being the amount of the sum recovered in the original action for the breach of covenant. It cannot be said that the defendant is liable to pay the costs of Mrs. *Coppock's* action against the plaintiff. Mrs. *Coppock* was the original lessor, and there was no privity between her and the present defendant. She could not have maintained any action against him. He was not the assignee

1824. NEALE v. WYLLIE.

of the lease, but merely the under lessee of the plaintiff, by an independent indenture. Had the defendant entered into a covenant to indemnify the plaintiff against any damages or costs which he might sustain in any action against him for not repairing the premises, the case might be different, but here there is no such covenant, and the plaintiff cannot ingraft any liability upon the covenants of the defendant's lease which was not stipulated for. Had the plaintiff put the premises in repair, he might have avoided an action and the expenses consequent thereupon, but having subjected himself to an action, he has no right to call upon the defendant to indemnify him the costs of that action. The case went to the jury upon the whole of the evidence, and they gave such damages as they thought the plaintiff had a right to recover. Under these circumstances their finding ought not to be disturbed.

Abraham, contrà, was stopped by the Court.

ABBOTT, C. J.—I am of opinion that the jury have assessed the damages upon erroneous grounds, and that a new writ of inquiry ought to be executed. The defendant having taken an assignment of the lease granted to *Finch*, bound himself by the covenant therein contained to keep the premises in repair during the demised term, and to deliver them up in a proper state of repair when the term expired. In consequence of the premises having been suffered to go out of repair, the plaintiff became liable to an action at the suit of the original lessor. He could not have avoided that action by entering upon the premises and causing them to be repaired during the term without subjecting himself to an action of trespass, and, therefore, it is no answer to his claim of special damage for the costs of the action to which he became liable, that he might have repaired the premises himself. I think the costs of that action are recoverable in this, as special damage resulting from the defendant's breach of covenant, and therefore the jury ought

to have included in their damages the sums which the plaintiff was obliged to pay in consequence of that action. Unless the plaintiff can recover those costs in this action, as well as the damages, he will be without remedy for an injury induced by the defendant's breach of covenant.

BAYLEY, J. and HOLROYD, J. (a) concurred.

Rule absolute.

(a) *Littledale*, J. was gone to chambers

PATTERSON d. GRADRIDGE and others *v.* EADES.

Monday, November 29.

Certiorari lies to remove an ejectment from an inferior jurisdiction at the instance of the defendant, on an affidavit that he cannot have a fair and impartial trial below, although the lease on which the ejectment was founded was executed on the premises within the local jurisdiction.

THIS was an ejectment for certain leasehold premises, situate in the city of *Winchester*, and the action having been brought in the Mayor's Court of that city, the defendant removed the record into this Court by certiorari. On a former day a rule nisi was obtained for quashing the certiorari, and awarding a procedendo on an affidavit that the lease on which the ejectment was brought, had been executed on the premises by the lessors of the plaintiff, and that the plaintiff intended to proceed to trial in the Mayor's Court, as soon as the recorder, a gentleman at the bar, should be present to preside, which was expected to be before the next *Lent* Assizes.

Jeremy now shewed cause on affidavits, which stated that the defendant had reason to believe that he should not have a fair and impartial trial in the Court below, inasmuch as the deputy town clerk was the attorney for the lessors of the plaintiff; and would, by virtue of his office, have to issue the jury process. He contended that the writ of certiorari was a writ of right, and issuable as a matter of course, but more especially upon a suggestion that the defendant was not likely to have a fair and impartial trial.

1824.

PATTERSON v. EADES.

W. E. Taunton contrà, contended that inasmuch as it was sworn, and not denied, that the lease in question had been executed, and sealed on the premises, the action must be tried within the local jurisdiction in which the premises were situated. This was the rule laid down in *Runnington on Ejectment*, 151, 152, *Sellon's Practice* (a), *Allen* v. *Burney* (b), and *Jones* v. *Davies* (c).

ABBOTT, C. J.—I think we ought not to quash the certiorari in this case. The defendant is entitled to the writ of certiorari as a matter of course. It is like the writ of *pone, recordari facias loquelam*, which may be issued to remove a replevin cause either by the plaintiff or the defendant, at the pleasure of the former, or by the latter upon reasonable cause; and there seems to be no sensible reason why an ejectment should not be removed as well as a replevin by a defendant, upon reasonable cause. Here, a reasonable cause is suggested, namely, the defendant's belief, for the reason assigned, that he cannot have a fair and impartial trial in the Court below. The case of *Jones* v. *Davies* is distinguishable from this, that being founded on the special and peculiar circumstances therein disclosed, and although Mr. Sergeant *Sellon's* Practice is a book of authority, yet the practice of the Court in many cases has been materially altered since it was published, and I think we ought not to act upon the rule there laid down, more especially as we do not find that rule recognized in more modern books of practice.

BAYLEY, J. and HOLROYD, J. (d) concurred.

Rule discharged.

(a) 2d Edit. vol. ii. p. 138.
(b) 2 Keeble, 119.
(c) 1 B. and C. 143.
(d) *Littledale*, J. was gone to chambers.

ANDREW DUNCAN, Gent. *v.* THWAITES and others.

Monday, November 29.

It is no justification to an action for a libel in a newspaper that the matter complained of is a true, fair, just, and correct report and account of proceedings which took place at a public police office, in the course of a preliminary inquiry openly and publicly conducted before a Justice, upon a criminal charge against the plaintiff, although published with no scandalous, defamatory, unworthy or unlawful motive, but merely as public news. It seems, however, that it is lawful to publish in a newspaper the result of what a Justice may think fit to do, upon a matter of criminal charge previous to trial, if the publication contains no statement of the evidence, nor any comments upon the case. *Quære.* Whether the publication of ex-parte proceedings even in this Court is allowable by law?

CASE for a libel. The first count of the declaration stated, that plaintiff was a person of good fame; and that he had not been guilty, or, until the time of the committing of the several grievances by the defendants as thereinafter mentioned, been suspected to have been guilty of indecently assaulting female children, or of attempting to violate the persons of female children, or of attempting feloniously to ravish and carnally know any female against her will, or any other such crime, and that the plaintiff before and at the time of the committing of the said several grievances by the several defendants as thereinafter mentioned, was and still is a solicitor of the High Court of Chancery; by means of which said several premises the plaintiff had not only obtained the good opinion of his neighbours, &c. but also in the way of his aforesaid profession was honestly acquiring great gains, &c. to wit, at &c. and that before the printing and publishing the respective false, scandalous, malicious, and defamatory libels in this count mentioned, to wit, on the 8th *July*, 1823, to wit, at &c. the plaintiff was taken and brought before *Thomas Halls*, Esquire, being then and there one of the Justices of our Lord the present King for *Westminster* and *Middlesex*, to answer a charge, complaint, and accusation against the plaintiff, for having assaulted *Ann Chandler*, and behaved in an indecent manner towards her, and the plaintiff being so taken and brought before the said Justice, the said charge was, to wit, on the 8th *July*, in the year aforesaid, to wit, at &c. proceeded upon and in part heard and examined into before the said Justice, and certain witnesses were heard and examined concerning the said charge, of which said witnesses so heard and examined the said *Ann Chandler* was one, and the further inquiry and

1824.
DUNCAN v. THWAITES.

examination concerning the said charge was adjourned by the said Justice to a future day, but at the time of printing and publishing the false, scandalous, malicious, and defamatory libel in this count mentioned, no bill of indictment had been preferred against the plaintiff for or in respect to the said charge, nor had any trial of the plaintiff by a jury of the country, been had or taken place, for or in respect to the said charge, and the subject matter of the said charge was then undecided, and undetermined, to wit, at &c. yet the defendants well knowing the premises, but contriving and intending wrongfully, unlawfully, and maliciously to hinder and obstruct the due course and proceedings of the administration of law and justice, and to hinder and prevent the plaintiff from having a fair and impartial trial in respect to the said charge, and to influence, inflame, and prejudice the minds of the liege subjects of our said Lord the King against the plaintiff, and to make it be believed that he the plaintiff had been and was guilty of having indecently assaulted a female child, and to injure the plaintiff in his aforesaid good name, fame, and credit, and also in his said profession and business of a solicitor, and to subject him to the pains and punishment to which persons who are guilty of assaulting females are liable, by the laws of this kingdom, and to vex, harass, oppress, impoverish, and ruin him the said plaintiff, heretofore, and before any bill of indictment was preferred against the plaintiff for the said supposed offence, and before any trial of the plaintiff was had by a jury of the country for the said supposed offence, and whilst the subject matter of the said charge was undecided and undetermined, to wit, on the 10th *July*, 1823, to wit, at &c. unlawfully, wrongfully, maliciously, and injuriously did print and publish, and caused to be printed and published in a certain newspaper called the *Morning Herald*, a certain scandalous, malicious, and defamatory libel of and concerning the plaintiff, and of and concerning the said charge, and of and concerning the said proceeding upon, and in part hearing, investigating, and examining of the said charge, before the said Justice, contain-

1824.

DUNCAN v. THWAITES.

ing therein divers scandalous, malicious, and defamatory matters and things of and concerning the plaintiff, and of and concerning the said charge, and of and concerning the said proceeding before, and in part hearing, investigating and examining the said charge before the said justice, according to the tenor and effect following, that is to say, "one Mr. *Andrew Duncan*, of *New Inn*, (meaning the said plaintiff,) underwent a long examination on a charge of having indecently assaulted a female child of only thirteen years old, (meaning the said *Ann Chandler*,) the evidence of the child herself, (meaning the said *Ann Chandler*,) and her companion, Mr. *Duncan's* (meaning the said plaintiff's) own cousin, of the same age, displayed such a complication of disgusting indecencies that we cannot detail it. It is right, however, that we should say the accused (meaning the said plaintiff) denied the principal facts alleged, and that the children made some slight variation in their evidence. Eventually the accused (meaning the said plaintiff) was admitted to bail, himself in 100*l.* and two sureties in 50*l.* each for his appearance again (meaning the appearance of the said plaintiff) on *Tuesday* next." The declaration contained eleven other counts founded on the same libel, but which were substantially the same as the first. The thirteenth count stated, that before the respective printing and publishing the respective scandalous, malicious, and defamatory libels in this count mentioned, to wit, on the 8th *July*, 1823, to wit, at &c. the plaintiff was taken and brought before the said *Thomas Halls*, Esq. being then and there one of the justices of our Lord the present King for *Westminster* and *Middlesex*, to answer a charge, complaint, and accusation against the plaintiff for having assaulted one *Ann Chandler* and behaved in an indecent manner towards her, and the plaintiff being so taken and brought before the said justice, and before the respective printing, and publishing, the respective scandalous, malicious and defamatory libels in this count mentioned, the said charge, complaint and accusation was, to wit, on the 8th *July*, in the year aforesaid, to wit, at &c. proceeded upon and in part

1824. DUNCAN v. THWAITES.

heard and examined into before the said justice, and certain witnesses were heard and examined touching and concerning the said charge, and the further inquiry and examination concerning the said charge was adjourned by the said justice to a future day. And whereas heretofore, to wit, on the said 15th *July*, in the year aforesaid, to wit, at &c. the said charge was further proceeded upon before the said *Thomas Halls*, the said justice. This count, after stating the same matter of inducement as is contained in the first count, alleged that before any trial was had by a jury of the country, for the said supposed offence, and whilst the subject matter of the said charge was undecided and undetermined, the defendants, to wit, on the 16th *July*, 1823, at &c. unlawfully, wrongfully, maliciously and injuriously did print and publish in a newspaper called the *Morning Herald*, a certain other scandalous, malicious and defamatory libel of and concerning the plaintiff, and of and concerning the said charge, and of and concerning the said proceedings thereupon, containing therein divers scandalous, malicious and defamatory matters and things of and concerning the plaintiff, and of and concerning the said charge, and of and concerning the said proceedings thereupon, according to the tenor and effect following, that is to say, " *Andrew Duncan* the attorney, (meaning the said plaintiff,) who was charged a week ago with attempting to violate the person of a girl of thirteen, named *Ann Chandler*, (meaning the said *Ann Chandler*,) was again examined, but no further evidence was heard; and he (meaning the said plaintiff) was ordered to enter into recognizances to the amount of 200*l*. for his appearance at the sessions, and all the witnesses were bound over to prosecute. The declaration contained eleven other counts upon this same libel of the 16th *July*. There were twelve other counts, some of which were framed on the first libel, and others on the second, but without the inducement contained in the other counts.

Pleas, First, the general issue, not guilty. Second, as to the publishing of the several libels in the said declaration

mentioned, that before any of the said several times, when, &c. to wit, on the 8th *July*, 1823, at the public office at *Bow Street*, in the county of *Middlesex*, before the said *Thomas Halls*, so being such justice as aforesaid, the plaintiff did undergo a long examination on a charge of having indecently assaulted a female child of only thirteen years old, to wit, one *Ann Chandler*, and attempting to violate the person of the said *Ann Chandler*, and the evidence of the child herself, and her companion, the plaintiff's own cousin, of the same age, did, upon that occasion, then and there display a complication of disgusting indecencies, although the plaintiff then and there denied the principal facts alleged, and the children made some slight variation in their evidence, and eventually the plaintiff was, on that occasion, then and there admitted to bail, himself in 100*l.* and two sureties in 50*l.* each, for the appearance of him, the said plaintiff, again on *Tuesday* then next following, and that afterwards, to wit, on *Tuesday* the 15th *July*, in the year aforesaid, at the public office in *Bow Street* aforesaid, the plaintiff was again examined before the said *Thomas Halls*, so being such justice as aforesaid, touching the said charge, but no further evidence was heard, and he, the said plaintiff, was then and there ordered by the said justice, to enter into recognizances to the amount of 200*l.* for his appearance at the sessions, and all the witnesses were bound over to prosecute; and that the said several supposed libels, in the said declaration mentioned, contained, and contain, no other than a true, fair, and just report and account of the proceedings which took place on the said 8th and 15th days of *July* respectively, at the said public police office in *Bow Street* aforesaid, on the respective occasions aforesaid, and were printed and published by the defendants in the said newspaper called the *Morning Herald*, with no scandalous, malicious or defamatory, unworthy, or unlawful motive whatever; and that the said proceeding therein reported as aforesaid, took place as aforesaid, publicly and openly at the said police office; and the said reports or accounts thereof,

1824.
DUNCAN
v.
THWAITES.

composing the said supposed libels, were so printed and published as aforesaid, in the said newspaper, as public news of such public proceedings, and with no other intent, and for no other object or purpose whatsoever, to wit, at &c. Third, that the several matters and things in the said several supposed libels contained, were and are true. Fourth, that the said supposed libels respectively were and consisted of nothing more than fair, true, and correct reports in the said newspaper, called the *Morning Herald*, of proceedings which took place publicly and openly before the said *Thomas Halls*, so being such justice as aforesaid, at the public police office at *Bow Street* aforesaid. Fifth, that as to the printing and publishing, and causing to be printed and published, the several supposed libels in the said declaration mentioned, which contain all or any part of the following words or matter, (that is to say) "One Mr. *Andrew Duncan*, of *New Inn*, underwent a long examination on a charge of having indecently assaulted a female child of only thirteen years old. The evidence of the child herself, and her companion, Mr. *Duncan's* own cousin, of the same age, displayed such a complication of disgusting indecencies, that we cannot detail it. It is right, however, that we should say the accused denied the principal facts alleged, and that the children made some slight variation in their evidence. Eventually the accused was admitted to bail, himself in 100*l.* and two sureties in 50*l.* each, for his appearance again on *Tuesday* next;"—the said defendants say that the said last mentioned supposed libels were and are several copies only of one and the same supposed libel, printed and published by the said defendants in several copies of the said public newspaper, called the *Morning Herald*, of *Thursday*, the 10th *July*, 1823, aforesaid, and that before that time, to wit, on the said 8th *July* in that year, the said plaintiff had been and was in due course of law taken and brought to the public office in *Bow Street*, in the county of *Middlesex*, before *Thomas Halls*, Esq. who was one of the justices for *Westminster* and *Middlesex*, to answer a certain charge

or complaint, made by one *Ann Chandler* the younger, against him, the said plaintiff, for having indecently assaulted her, the said *Ann Chandler*, she, the said *Ann Chandler*, then and there being a female child of only thirteen years old, and the said plaintiff did then and there undergo a long examination on that charge, and on that occasion then and there publicly in the presence of the said plaintiff, before the said justice, *Ann Chandler* the elder, mother of the said *Ann Chandler*, did make oath and depose as follows, that is to say. (Here the plea set forth, verbatim, the several depositions taken before the justice in support of the alleged charge against the plaintiff. One of the deponents was Mr. *Desormeaux*, a surgeon, who had examined the child, and from his testimony it appeared that *Ann Chandler* had repeatedly answered in the negative several questions put by him, which she had answered in the affirmative, when she was examined by the magistrate); and that the plaintiff then and there, on the occasion aforesaid, denied the principal facts alleged against him as aforesaid, and was eventually admitted to bail, himself in 100*l.* and two sureties in 50*l.* each, for his appearance again on *Tuesday* then next, before the said justice, to answer the said charge or complaint, to wit, at *London* aforesaid, in the parish aforesaid. Wherefore the said defendants printed and published, and caused to be printed and published, the said supposed libels in the introductory part of this plea mentioned, in copies of the said public newspaper called the *Morning Herald*, of the said 10th *July*, as and for, and the same being a true, fair, just, and correct report and account of the said proceedings, which took place on the said 10th *July*, in the year aforesaid, at the said police office, on the occasion aforesaid, and the said report or account thereof, composing the said last mentioned supposed libels, was so printed and published as aforesaid, in the said copies of the said newspaper, as public news of the said last mentioned proceedings, and with no other intent, and for no other object or purpose, whatsoever, to wit, at &c. Sixth, that as to the printing

1824.

DUNCAN v. THWAITES.

and publishing, and causing to be printed and published, the said several supposed libels, in the said declaration mentioned, which contain all or any part of the following matter, (that is to say) "*Andrew Duncan*, the attorney, who was charged a week ago with attempting to violate the person of a girl of thirteen, named *Ann Chandler*, was again examined, but no further evidence was heard, and he was ordered to enter into recognizances, to the amount of 200*l.* for his appearance at the sessions, and all the witnesses were bound over to prosecute,"—the said defendants say, that the said last mentioned several supposed libels were and are copies only of one and the same supposed libel, printed and published by the said defendants, in several copies of the said public newspaper, called the *Morning Herald*, of *Tuesday* the 16th *July*, 1823, aforesaid; and that after the said proceedings at the said public police office, in the last preceding plea mentioned, had taken place, as in that plea is mentioned, and which did actually take place as is therein stated and set forth, and before the said 16th *July*, 1823, to wit, on the 15th *July* in that year, the said plaintiff was publicly examined at the said police office, before the said justice, respecting the said charge or complaint, in the said last plea mentioned, but no further evidence was on that occasion heard respecting the said charge or complaint, and he, the said plaintiff, was then and there ordered, by the said justice, to enter into recognizances, to the amount of 200*l.* for his appearance at the sessions of the peace, to be holden in and for the said county of *Middlesex*, to answer the said charge or complaint, and all the witnesses so examined, as in the said last plea mentioned, were bound over to prosecute for the same, at such sessions, to wit, at &c.; wherefore, the said defendants printed and published, and caused to be printed and published, the said supposed libels, in the introductory part of this plea mentioned, in copies of the said public newspaper, called the *Morning Herald*, of the said 16th *July*, as and for, and the same being a true, fair, just, and correct report and account

1824.
DUNCAN v. THWAITES.

of the said proceedings, which took place on the said 15th *July*, at the said police office, on the occasion last aforesaid, and the said report or account thereof, composing the said last mentioned supposed libels, was so printed and published in the said newspaper as public news of the said last mentioned proceedings, and with no other intent, and for no other object or purpose whatsoever, to wit, at &c. The seventh and eighth pleas were pleaded respectively to a part only of the libels of the 10th and 16th *July*, but were similar in other respects to the fifth and sixth pleas. Demurrer to these pleas, (assigning causes, the principal of which are taken notice of in the argument,) and joinder in demurrer.

Patteson, in support of the demurrer. The second plea is manifestly bad, because the libel does not even profess to state all that took place at the police office; it is a mere summary of the transaction, or, rather that which the author considered as the result of it. Then, unless the publication is aided by the plea which does state what took place, this case is within the principle of *Lewis* v. *Walter* (a), and this plea is bad. The libel stated in the declaration there, purported to be the speech of counsel at a trial of the plaintiff on a criminal charge; and it stated, after setting out the speech, that a witness was called, who proved all that had been stated by counsel, and that the defendant was immediately after that acquitted, upon a defect in proving some matter of form. The plea stated, that in fact such a speech was made, and that the witness called proved all that had been so stated; but it did not set out the evidence, or justify the truth of the charges made in the counsel's speech, and it was held, that such plea was bad, inasmuch as a party could not be justified in publishing the result of evidence given in a court of justice, but must state the evidence itself. The principle of that decision, and the reasoning of the Court upon it, apply strongly to this case. The defect in the second plea is not cured by those which follow, and set out

(a) 4 B. & A. 605.

1824.
DUNCAN
v.
THWAITES.

the evidence; for, the libel, being published in a newspaper, was circulated through the country at large; but the plea, being put upon the record, can have no such circulation, and could not operate to disarm the libel of its sting, except by being published in the same newspaper with the libel itself. The third plea is also bad, upon either of two views of it. It avers generally that the matters contained in the libel are true. Construing that to mean that the libel is a true representation of all that took place at the police office, this plea is bad for the objections taken to the second; and, construing it to mean that the plaintiff is guilty of the offence imputed to him, it is bad for want of particularity, for it contains no description of the party charged or the offence imputed, no enumeration of the facts, and no statement of the circumstances either with name, time, or place; and many authorities concur in shewing that those omissions are fatal: *J'Anson* v. *Stuart* (*a*), *Holmes* v. *Catesby* (*b*), and *Jones* v. *Stevens* (*c*). It is further bad in the respect already mentioned, namely, the uncertainty of its meaning, whether it alleges the truth of the libel, or the truth of the charge. The fourth plea requires no observation; that is clearly bad for the same reasons as the second. It may, however, be noticed, that these three pleas are all bad upon another ground; namely, that they amount to the general issue. And this is not a mere technical objection; for, granting the libel to be a true representation of what took place at the police office, these pleas do not justify the whole charge, but merely go to the motives of the defendants, which is only a denial of malice, and might have been proved under the general issue; and the result of pleading in bar the absence of malice, would be to infringe upon the province of the jury, by withholding from their consideration the question of malice altogether. On this point, *Lewis* v. *Walter* (*d*) again applies to the present case. The fifth plea, which is in answer to the first libel only, sets out all

(*a*) 1 T. R. 748.
(*b*) 1 Taunt. 543.
(*c*) 11 Price, 235.
(*d*) 4 B. and A. 605.

1824.

DUNCAN v. THWAITES.

the evidence, but is clearly bad in this respect, that it shews upon the face of it, that the libel is not a true representation of all that took place at the police office, because it omits the evidence of the surgeon, which was most important to the establishment of the plaintiff's innocence of the charge. This objection applies equally to the seventh plea. But, assuming that the defect of evidence in the libel is cured by the statement of it in the plea, and that the plea contains a true representation of all that took place at the police office, the main, general, and highly important question raised upon this record, presents itself; namely, whether any man is by law allowed to publish an account of the ex-parte and preliminary proceedings at a police office, when the matters so published are libellous and defamatory of any individual. Now it has been repeatedly held that the publication of ex-parte proceedings at a police office, is an offence at common law; *Rex* v. *Lee* (*a*) and *Rex* v. *Fisher* (*b*); in the latter of which Lord *Ellenborough* stated the ground of his decision to be, that the tendency of such a publication is to prejudice the minds of the jurymen against the accused, and to deprive him of a fair trial. The Court will grant a criminal information for publishing, in a newspaper, a statement of the evidence given before a coroner's jury, accompanied with comments, although the statement be correct, and the party has no malicious motive in the publication: *Rex* v. *Fleet* (*c*). In that case, *Abbott*, C. J. and *Bayley*, J. express the ground of their decisions to be the same as that expressed by Lord *Ellenborough*; namely, that such publications tend to pervert public justice, by prejudicing the minds and feelings of juries, and preventing the parties accused from obtaining a fair and impartial trial. Again, it has been decided by this Court, that a court of general gaol delivery has the power to make an order to prohibit the publication of the proceedings pending a trial, and to punish disobedience to such order by fine: *Rex* v. *Clement* (*d*). All

(*a*) 5 Esp. 123.
(*b*) 2 Camp. 563.
(*c*) 1 B & A. 379.
(*d*) 4 B. & A. 218.

1824.

DUNCAN v. THWAITES.

these, indeed, are cases of information or indictment, for the question is now raised in the form of a civil action for the first time; but there is no sound distinction in this respect between an action and an information or indictment. The objection is that the accused party is prejudiced, and an indictment proceeds upon the ground that the publication tends to pervert the course of public justice by preventing the possibility of a fair trial, and that it is therefore an offence at common law. Then, if the accused party is in fact prejudiced by the publication, why should he not be entitled to a remedy in a civil action? The truth of the libel is, indeed, a justification in an action, and not in an indictment; and so far the one is distinguishable from the other. But why has the law made that distinction? Because the tendency of the publication to produce a breach of the peace will support an indictment, and that tendency attaches equally, whether the libel be true or false. This publication is clearly illegal in another point of view. The proceedings detailed in it did not take place before a tribunal which was open to the public as a matter of right; for it has been decided that a police office is not an open court of justice, and that the public have no right of admission to it: *Cox* v. *Coleridge* (a). These proceedings, therefore, stand upon a very different footing from those of a court of justice, open of right to all mankind; and those who are permitted by the magistrate, as a favour, to be present, have, by law, as little right to publish them, and thereby to circulate matters defamatory of an individual, as they would have if the whole transaction occurred in a private room. But it is, at least, questionable, whether the proceedings of an open court of justice may in all cases, and as a matter of right, be published. *Rex* v. *Wright* (b) will be cited on the other side to shew that such publications are lawful; but that is a solitary decision, and there are many others strongly conflicting with it, and that, moreover, was the case of a publication of a report made by the House of Commons, which,

(a) Ante, vol. ii. 87.

(b) 8 T. R. 293.

1824.
DUNCAN v. THWAITES.

it was held, could not possibly be considered as containing libellous matter. *Rex* v. *Crevey* (*a*) decided that a member of the House of Commons may be convicted upon an indictment for a libel, in publishing in a newspaper the report of a speech delivered by him in that house, if it contain libellous matter. In *Rex* v. *Mary Carlile* (*b*) it was held, that it was not lawful to publish even a correct account of the proceedings in a court of justice, if such an account contain matter of a scandalous, blasphemous, or indecent nature. Then, if the proceedings of a court of justice cannot lawfully be published where they are scandalous and prejudicial to any other person, à fortiori, such proceedings in a police office cannot be published, because, as they are ex-parte and preliminary, the necessary tendency of the publication of them is to pervert public justice, and deprive the party of an impartial trial. Lastly, are such publications to be supported on the grounds of public policy? Most certainly they are not. There is, it must be admitted, one possible and contingent advantage arising from them; but that is more than counterbalanced by many certain and necessary disadvantages. The contingency is, that the publication of the proceedings may by chance attract the notice of persons who may be capable to come forward as witnesses, either for or against the accused, and who, but for such a publication, could not have been produced; and that thus the ends of public justice may be promoted. The certainty is, that every man who is apprehended upon any criminal charge, however innocent he may ultimately prove to be, will be harassed in his feelings, and injured in his character. Such a charge against a man, once given to the world, will never be wholly forgotten, for it can never be perfectly contradicted; thousands may read his accusation who may never hear of his acquittal, and the injury thus inflicted will be as deep as it must be irreparable. Such a proposition as this requires not to be enforced by arguments or authorities, but if it did, recent cases have unhappily too plainly

(*a*) 1 M. & S. 273.

(*b*) 3 B. & A. 167.

1824.

DUNCAN v. THWAITES.

demonstrated the certainty and the extent of the inconvenience it points out. *Rex* v. *Mead* (*a*) and *Rex* v. *Thurtell* (*b*). Even if the special grounds of objection to these pleas, therefore, should fail, the demurrer is to be supported upon general principles, for it is clear that the publication of proceedings such as these is as much opposed to public policy, propriety and convenience, as it is to the common law and settled constitution of the country.

E. Lawes, contrà. The first question raised on these pleadings is whether the publication in a newspaper, of a true account of the substance of what passed before a magistrate, publicly at a police office, respecting a prisoner there present and charged with an attempt to commit a rape, published as public news, without comment of any sort, or any malicious or defamatory motive whatever, be justifiable; and second, whether the particulars of the defendant's examination, as well as all the indecencies mentioned in the depositions, must be detailed in the publication, or whether it is not sufficient to state fairly the substance of what passed before the magistrate. It may be admitted that reports of legal proceedings may be libellous whether ex-parte or not; but all the cases in which they have been held libellous are reducible to three classes; first, where the account published has been false or highly coloured, *Waterfield* v. *The Bishop of Chester* (*c*), *Rex* v. *Wright* (*d*); second, where the narrator has added some comments or opinions of his own, reflecting on the Court or the party, *Stiles* v. *Noakes* (*e*), *Carr* v. *Jones* (*f*), *Rex* v. *Lee* (*g*), *Rex* v. *Fisher* (*h*), *Rex* v. *Fleet* (*i*), *Lewis* v. *Clement* (*k*); and third, where the report has been made the vehicle of blasphemy or indecency, *Rex* v. *Mary Carlile* (*l*). In all these cases a public prosecution or a private action may be well maintained. The same

(*a*) Ante, vol. iii. 301. (*b*) Tried for murder at Hertford, 1824.
(*c*) 2 Mod. 118. (*d*) 8 T. R. 298. (*e*) 7 East, 493.
(*f*) 3 Smith, 491. (*g*) 5 Esp. 125. (*h*) 2 Camp. 570.
(*i*) 1 B. and A. 379. (*k*) 3 B. and A. 702. (*l*) 3 B. and A. 167.

principle applies to the reports of proceedings in parliament, *Rex* v. *Lord Abingdon* (*a*), *Rex* v. *Creevey* (*b*). Now the publication in question does not fall within any of these excepted classes of cases. Here is no false or highly coloured account of what took place before the magistrate; no comment or opinion of the reporter, reflecting on the character of the plaintiff; nor does it contain any thing immoral or indecent. It is a fair, true, and impartial account of the substance of what passed before the magistrate, and is therefore privileged. The general rule will not be disputed that the proceedings of public courts of justice may be the subject of publication, when the publication does not fall within any of the classes of cases enumerated. [*Bayley*, J. Do you mean by that, such Courts as *ought* to be open to the public, or such as are open, because the magistrates allow them to be open, and not because they ought to be open?] If upon the public examination of a prisoner at a police office, the magistrate does not think proper to prohibit the publication of the proceedings, there is nothing unlawful in publishing a true, fair, and correct account of the substance of what passes. The question here is whether the mere circumstance of the examination being ex-parte, the publication of it shall subject the publisher of it to a civil action. No case, nor even a dictum has been cited on the other side, in which it has been held that the publication of ex-parte proceedings may be the subject of a civil action. All the cases that have been cited are cases of criminal prosecutions. Such were the cases of *Rex* v. *Lee*, *Rex* v. *Fisher*, and *Rex* v. *Fleet*. It is true that in *Rex* v. *Lee*, Mr. Justice *Heath* expressed an opinion that the publication of ex-parte evidence before trial, was of itself highly criminal, but that was a mere obiter dictum, and no decision has taken place in which that doctrine is expressly recognized. [*Bayley*, J. I am of opinion that to publish the ex-parte depositions against a person under a criminal charge, before he is put upon his trial, is highly

(*a*) 1 Esp. 228. (*b*) 1 M. and S. 279.

1824.

DUNCAN v. THWAITES.

criminal, because it has a tendency to prevent his having a fair and impartial trial before that tribunal which is afterwards to decide upon his guilt or innocence.] Conceding that to be so, still the question is whether such a publication can be the subject of a civil action. The main question upon these pleadings is whether the pleas are well pleaded, it being admitted that there is a total absence of any malice towards the plaintiff, and that the publication has taken place without any unworthy or unlawful motive. [*Bayley*, J. If an action is brought against a man for calling another a thief, would it be a good defence to such action for the defendant to say, "I really believed him to be a thief at the time I said so, and though I admit that what I said was calculated to injure his character, yet I really acted most conscientiously under a full belief that what I said was true?" Does the negation of malice destroy the right of action where an injury results? The mischievous effect to the party complaining, may be just as great as if it was intentional. It must not be assumed, that the absence of a malicious intention would be an answer to the action.] It may be conceded that the publication of ex-parte proceedings, before a magistrate, previous to trial is an indictable offence, but it remains to be proved that such a publication can be the subject of an *action*, before the trial of the party complaining has actually taken place. The principle upon which an indictment for such a publication might be founded is well expressed by *Holroyd*, J. in *Rex* v. *Fleet* (*a*), where that learned Judge says "these publications have a tendency improperly to influence the public mind, and are most mischievous in their results. They are often made use of in the most unjustifiable manner, and produce very dangerous consequences." As respects the public therefore such publications may be the subject of criminal prosecution, but non constat that the private party shall have an action for such a publication, more especially where no trial has taken place, as in the present case.

(*a*) 1 B. and A. 385.

Having stated the main questions, arising upon this record, it is necessary to advert more particularly to the averments contained in the declaration. The plaintiff sets out by stating that he had never been suspected to have been guilty of indecently assaulting female children, or of attempting to violate the persons of female children, or of attempting feloniously to ravish and carnally know any female, against her will, or any other such crime. Now this allegation appears upon the face of the record to be false, because it appears in point of fact, that he was suspected of such a crime, and that it was in consequence of that suspicion that he was taken before the justice and examined. The plaintiff does not use even the common and ordinary language in such cases, namely, that he had been brought before the magistrate upon a false and malicious charge, without any reasonable or probable cause. He does not say that the charge was false and malicious, and that there was no ground for making it. But there is another fact alleged by him, which at once puts an end to his action. It is averred that the charge is undecided and undetermined. He states in terms, that there is no judgment of law pronounced for or against him. If he be found guilty notwithstanding this publication, where is his injury, and what is his claim to damages? He may or may not be guilty. The question is whether there was such a charge made against him before a magistrate. This is not a malicious publication wantonly made without any foundation. Here is a charge duly made before a magistrate. The defendants do not accuse the plaintiff of any criminality whatever. All that they have stated is that, in a legal way, he had been charged with the alleged crime before a magistrate. The charge may be utterly groundless, but that cannot be ascertained until the matter is inquired into by due course of law. There is a broad distinction between this sort of supposed slander, and that which imputes a crime to the plaintiff as matter of pure malicious invention. In a learned note to *Hodgson* v. *Scar-*

1824.

DUNCAN v. THWAITES.

lett (a) this distinction is well pointed out. If it be said that the tendency of such publications is to deprive the plaintiff of a fair and impartial trial, that is an argument which may be applicable to an indictment, but it has no reference to a civil action. [*Bayley*, J. Do you think it is no personal injury to publish such ex-parte statements as they respect the person who is to be afterwards tried?] If it could be shewn that a person had been wrongfully convicted in consequence of such a publication, then in that point of view perhaps, he might have some cause of action, but that is not the present case. Here the plaintiff has not been tried. If he be rightly found guilty, and the sentence of the law is put in execution, it cannot be said that he has sustained any injury from this publication; but if he be acquitted, it may be also said that he has sustained no injury from it; but here the plaintiff brings his action for damages before either of these events has taken place. Hitherto therefore he cannot be said to have sustained any injury, and consequently the action is premature, and the defendants are entitled to judgment. Certainly as to the mode in which the case has been reported, the plaintiff has no just reason to complain. The simple fact is stated without comment, and in the most mitigated way. Suppose, instead of stating the case in the most favourable way to the plaintiff, the defendants had published the deposition from the beginning to the end, then indeed he might have had some reason to complain, but as the case at present stands it is damnum absque injuriâ. All the authorities and dicta cited on the other side as applicable to this case, are referable to crown prosecutions, and not to civil actions. Now there is a radical sound distinction, between proceedings by action and indictment. In the first place, upon an indictment or information for a libel, the character of the prosecutor, although he be a private individual, has nothing to do with the case, because the object is to prevent a breach of the peace. Character, in that point of view, is out of the ques-

(a) 1 B. and A. 245.

tion; and indeed it may often happen that the man who has no character at all has a better chance, than he who has a good character, and is of a peaceable disposition. But in civil actions, on the contrary, the loss of character is the very basis of the action. The books are full of cases upon this point (*a*). There is also a distinction as to costs which it is unnecessary more particularly to point out. The next distinction between indictments and actions is, that in the latter, the plaintiff must have sustained some particular injury or inconvenience. For instance, though a public nuisance may produce particular inconvenience to an individual, it does not follow that he can maintain an action. In *Ireson* v. *Moore* (*b*) it was held, that unless the plaintiff shews that he has some local fixed interest which does not belong to the rest of the King's subjects, he can maintain no action. Here, at the time when this action was commenced, the plaintiff had not sustained any particular injury any more than the rest of the King's subjects. The utmost that this publication can be said to have a tendency to do, is to impede the due administration of justice, but in this respect the plaintiff has suffered no more inconvenience, than may be supposed to have resulted to him in common with all the public. He has sustained no special or particular injury, which can give him a right of action. Another distinction between an indictment and an action for a libel is, that in the one case the truth of the matter stated is no defence, whereas in the latter the truth of it is every thing. The next distinction is, that if a prosecution is instituted for a libel, and the prosecutor dies before, or during the prosecution, still the indictment may be proceeded in, and the defendant brought to punishment. Not so of an action, for actio personalis moritur cum personâ. The suit abates upon the death of the plaintiff, so that there is a wide distinction in this respect between the two cases. The form in each is also different. There is one rule only, in which they both concur, namely, that in both a civil action

(*a*) See 1 Levins, 82. (*b*) 1 Salk. 15.

1824.

DUNCAN *v.* THWAITES.

and in an indictment, the libel must contain something more than mere defamatory matter; there must be an evil intention in the party publishing the libel, and a civil action cannot be maintained if there be a total absence of malice in the mind of the defendant. In this respect alone do these modes of proceeding concur. [*Bayley*, J. Have you any authority for saying that in a private action of slander which is utterly false, it is a good defence that the defendant spoke the words without malice?] There are several cases in which that principle is recognized, but it is sufficient to refer to those authorities which are applicable to the particular case now under consideration. In *Carpenter* v. *Tarrant* (*a*) an action was brought for these words: " *Carpenter* was in *Winchester* gaol, and tried for his life, and would have been hanged had it not been for *Leggat*, for breaking open the granary of farmer *A.* and stealing his bacon;" and there *Lee*, J. said, " if these words had been only a narrative of what passed at the trial, he might have pleaded it so and justified, though at the trial it could have been given in evidence in mitigation of damages; the true gist of the action with respect to the defendant being, whether he spoke the words falsely and maliciously." The case of *Curry* v. *Walter* (*b*) seems an authority expressly in point, for that was the case of a newspaper report of an *ex-parte* proceeding in this Court. It was an account of an application for a criminal information against magistrates for alleged misconduct, and the application was refused for want of due notice of motion. The proceeding was stopped in limine, on a technical ground, and was to all intents and purposes an ex-parte proceeding. It was objected that an action for such a publication was not maintainable; and *Eyre*, C. J. laid it down that a bonâ fide report containing the substance of the speech delivered in Court was not actionable. This decision was afterwards confirmed in the Court of Common Pleas (*c*); and it was held that although such an ex-parte

(*a*) Cas. temp. Hardw. 339. (*b*) 1 Esp. 456.
(*c*) 1 Bos. & Pul. 525.

publication might be defamatory of the character of an individual, yet the party could have no action. It must frequently happen that the reports of what passes in Courts of Justice will be injurious to the character of private persons, but if there is to be any limitation to the privilege of reporting what passes, it will operate to its total destruction. Undoubtedly in *Curry* v. *Walter* the decision was in a great degree founded on the circumstance of the publicity of the tribunal, and that a Court of Justice being open to all the world, it was lawful to publish what passed there. Lord C. J. *Eyre*, however, did not lay any stress on the sort of jurisdiction which belonged to the tribunal, but relied upon its publicity. Now if the magistrates at a public police office do not chuse to exclude the public, or prohibit the publication of their proceedings, theirs is as much an open Court as any other tribunal in the country. [*Bayley*, J. Define what is a public Court of Justice. The Court in which we sit, is a public Court; but is the magistrates' room a public Court? The question is not whether the Justice room, is in fact, open to the public, but whether it ought to be so. There is a very material distinction between a police office, and a public Court of Justice.] In *Currie* v. *Walter*, Lord C. J. *Eyre* speaks of the publicity of the tribunal, and not of the nature of the jurisdiction. Here the magistrates did not think proper to exclude the public, as they might have done, according to the late case of *Cox* v. *Coleridge* (*a*), and therefore as it was in fact an open Court, its proceedings might lawfully be made public. [*Bayley*, J. What Lord C. J. *Eyre* says, is applicable to a Court, the proceedings of which must of necessity be public.] No judicial decision has ever taken place shaking the authority of *Currie* v. *Walter*, the doctrine of which is certainly in point with this case. It was recognized as law in *Stiles* v. *Noakes* (*b*), *Rex* v. *Fisher* (*c*), *Rex* v. *Carlile*, where the defendant was prosecuted for publishing what he called his mock trial, and in *Lewis* v. *Clement*. The case of *Rex*

(*a*) Ante, vol. iii. 86. (*b*) 7 East, 493. (*c*) 2 Campb. 570.

1824.

DUNCAN *v.* THWAITES.

v. *Wright* (*a*) is also in point with this. There it was solemnly decided, that the printing of a true copy of the report of a Committee of the House of Commons, containing a charge injurious to an individual, was not libellous. From analogy, then, the publication of what passes before a magistrate, if truly reported, must be equally privileged. The intention of the party is to be considered. The defendants have published a true narrative, report, and account of what passed before the magistrate. If it was not defamatory to say all this before the magistrate surely it cannot be libellous to publish it in a newspaper. It is a visionary objection so say that the plaintiff cannot have a fair trial, in consequence of this publication, if the accusation itself be well founded. It can be no libel to say truly that a man was accused of a crime. Upon principles of public policy it is of importance that publicity should be given to matters of this nature if it be done fairly and bonâ fide. The public is interested in information contained in such publications as far as they respect the detection or prevention of crime. Would it be a libel to publish a handbill offering a reward for the apprehension of a person bonâ fide accused of a crime? The case of *Delany* v. *Jones* (*b*) is an authority to shew that it would not. Then if not, the publication in question cannot be considered libellous. Would it be a libel to publish as a fact that the grand jury had found a true bill against A. B. for felony: for to that length must the argument go on the other side. Here there is no affirmation of the defendant's guilt. All that is said is that the plaintiff was accused of the offence imputed to him by the prosecutrix. Nobody ever supposes that police reports contain the whole case on both sides. Every man knows that they are ex-parte statements of what takes place previous to trial, and therefore it is idle to imagine that such publications can pervert justice, or prevent a fair and impartial trial to the party accused. The doctrine contended for on the other side would go the whole length of preventing any per-

(*a*) 8 T. R. 293. (*b*) 4 Esp. 191.

son from even preferring an accusation, lest he should be subjected to an action. If it is supposed that these publications have a tendency to prejudice the minds of the jury who are to try the offence, it may with much more propriety be said that the bare reading of an indictment will have that effect, and certainly it will have as much as the reading of a report of the case beforehand in the newspaper. Where is the distinction or the limit to be drawn if this is to be the test of the legality of such publications? The argument on the other side assumes several propositions which have no foundation. In the first place it assumes that the persons who are present at the examinations of a party accused will keep secret what they have heard. In the second, it assumes that what may lawfully be heard by as many persons as the police office will conveniently contain, may not lawfully be communicated to others out of doors, either verbally or by writing. Is it to be said that the lips of persons who have heard what passes in a police office must be sealed, and that they shall not communicate one with the other without subjecting themselves to an action? Again, it assumes that there will be a trial of the plaintiff for the alleged offence. Now that is falsely assumed, because it is not averred on this record that it is even likely that the plaintiff will be prosecuted. The charge may have been compromised or disposed of in some other way. The only pretence upon which it is to be supposed that the plaintiff will be prejudiced, is that he may not have a fair trial by reason of this publication. Suppose no trial ever takes place, surely the plaintiff is out of Court on that ground. It is not improbable that, under the circumstances of the case, the plaintiff will never be brought to trial, and if that be so, then he can have sustained no injury. [*Bayley*, J. If the party who has brought forward a false charge against another, does not chuse afterwards to go before a grand jury and prefer a bill of indictment, does not the publication of the charge work a prejudice to the character of the party accused?] That may be; but the remedy is not against the

1824. DUNCAN v. THWAITES.

publisher, but against the person who makes the false charge. Here the ground taken is that the plaintiff will be prejudiced on his trial by this publication; but if there be no intention to prosecute and if none be averred, then that ground of argument wholly fails. Why is it to be assumed that the jury will necessarily be prejudiced by this publication? Non constat that they will ever see the newspaper in which the publication appears. But besides this, the law does not suppose that jurymen are entirely ignorant when they come into the box, of the matters they are to try; for they are required to come from the neighbourhood of the place where the offence is committed, and it is well known that when any case of public interest arises it is universally talked of, and innumerable reports concerning it are whispered abroad, from which the minds of jurymen are in much greater danger of being poisoned, than from authentic accounts of informations upon oath before the committing magistrate. In *Rex* v. *Fisher* it was said that the sense of the legislature had been lately declared upon this subject. A bill was introduced into parliament in 1810 to prohibit these publications (which shews that they were not unlawful before); but the opinion of enlightened men being that the general benefit arising from them outweighs the private inconvenience, the bill was dropped. But assuming that these publications are sometimes injurious to individuals, still they are often attended with great public advantage in the furtherance of justice. They are useful from their tendency to protect innocent persons, falsely accused, by communicating knowledge of the accusation to their friends, and enabling them to come forward on their behalf. On the other hand they are useful as a channel of information to persons who may give evidence in support of an accusation against others justly charged. Many cases never go to trial and sentence, and non constat that this plaintiff would be convicted; but still it is of the utmost importance to the public to know what is going on before police magistrates, whether a prosecution takes place or not, for every man is

1824.

DUNCAN v. THWAITES.

interested in the administration of justice. It frequently happens that prisoners who are committed for trial for offences are not prosecuted, and yet could it be said that the insertion of their names in the calendar of prisoners, would give them a right of action against the printer of the calendar? Even as respects the vigilance which is justly exercised by the public in watching the proceedings of magistrates, it is of essential importance that what takes place before them should be made public. If it be lawful to watch Courts of superior jurisdiction, how much more justifiable is it to view with jealousy the conduct of inferior Courts. Is there to be less vigilance exercised with regard to inferior, than to superior jurisdictions? No sound distinction can be made between the right of publishing ex-parte proceedings and those which terminate immediately in adjudication and sentence, for the public are equally interested in both. It can be no slander to say of any man, however honourable or innocent he may be, that he is accused, if there be no predication of his guilt. The most innocent men are frequently accused falsely, but it is no libel to repeat an accusation, if it be made in the course of justice. In the eye of the law every accused peron is presumed to be innocent until condemnation takes place, and upon the same principle the law will not presume the statement of the accusation to be slanderous. For these reasons the publication in question is privileged. But there is another ground which affords a complete answer to this action. Malice in the defendant is of the very essence of the action for libel, and if there be a complete absence of malicious motive, it is a full defence. Here there is a total absence of malice, and consequently the action must fail. There are several authorities to shew that the malice of the defendant is negatived, where the defamatory matter is delivered bonâ fide, or justified by the occasion, or from the interest which the party has in the accusation. Upon these principles *Delaney* v. *Jones* (*a*), *Moulton* v. *Clapham* (*b*), *Brook* v. *Montagu* (*c*), *Hodgson* v.

(*a*) 4 Esp. 191. (*b*) 1 Roll. Abr. 87. (*c*) Cro. Jac. 90.

1824.
DUNCAN
v.
THWAITES.

Scarlett (*a*), *Edmondson* v. *Stephenson* (*b*), *Weatherstone* v. *Hawkins* (*c*), and *Greenwood's* case, cited in *Cro. Jac.* 90, were decided. These are all authorities to shew that the occasion of delivering the defamatory matter rebuts the presumption of malice. Applying this principle to the case at bar, the occasion justifies the publication and rebuts the presumption of malice. A newspaper editor stands in loco of a trustee of the public morals. In that character he has an important influence in guarding the morals of the country. He has a great and important duty and office to perform, whether in communicating information or instruction to the public. The proprietor of a newspaper is recognized by statutes, as an ostensible person, who has certain duties to perform, and is subjected to particular responsibilities. In this case, therefore, the defendants do not stand in the situation of persons who have no excuse or laudable motive for the publication of the supposed libel. No intention can be imputed to them beyond the desire of informing the public, and communicating to their readers, as matter of news and instruction, that which passes openly and publicly before a magistrate. The public, as already said, have an interest in all proceedings relating to the administration of justice, and consequently, whether in the result those proceedings are favourable or otherwise to the party accused, the fact of the accusation may be lawfully made public. If the matter of accusation be not per se libellous, it cannot become so by publication. The principle upon which this case must be decided, is also recognized in *Dibdin* v. *Swan* (*d*) and *Carr* v. *Hood* (*e*), where it is held that theatrical or literary criticism, however injurious it may be to the individual, yet if bonâ fide, it is not actionable, on account of the interest which the public has in matters of this nature. The cases of *Astley* v. *Young* (*f*), *Crawford* v. *Johnson* (*g*), *Rex* v. *Lord Abingdon* (*h*), *Harrison* v. *King* (*i*), also support the

(*a*) 1 B. and A. 232. (*b*) Bull. N. P. 8.
(*c*) 1 T. R. 110. See *Fairman* v *Ives*, ante, vol. i. 252.
(*d*) 1 Esp. 28. (*e*) 1 Camp. 355. (*f*) 2 Burr. 810.
(*g*) 1 Levins, 82. (*h*) 1 Esp. 28 (*i*) 4 Price, 46. and 7 Taunt. 431.

1824.

DUNCAN v. THWAITES.

principle upon which this is to be decided. On these grounds the second, which is the material plea upon the record, is an answer to the action. That plea expressly avers, that the supposed libellous matter was published without any malicious motive whatever, and as that fact is admitted by the demurrer, it is an answer to the action. But then it is objected that this publication cannot be justified inasmuch as it only contains the substance of what took place before the magistrates, and does not set out the whole of the evidence, and the case of *Lewis* v. *Walter* (a) is referred to as an authority in point. Now that case is distinguishable from this, because there there was no reason for not setting out the details of the evidence. Here there is the strongest reason for omitting them, because if all the depositions were detailed in the newspaper as delivered, they would be offensive to public morals and decency. Indeed had the defendants published those offensive details, they would be liable to an indictment for an offence contra bonos mores. But independently of this answer to the objection, it would be almost impracticable, and certainly impolitic, to give a verbatim report of proceedings of any description at a police office, or before the superior courts of justice. If it be held that nothing short of a verbatim account of such transactions shall be an excuse for the publisher, it must operate as a total annihilation of the privilege of reporting. Indeed a verbatim report of any sort can never give the same sense of what takes place, so well as a report of the substance of what passes. On this ground also the defendants are entitled to judgment (b).

Patteson, in reply, re-urged the argument which he had addressed in support of the demurrer.

The Court took time to consider the case, and judgment was now delivered by

(a) 4 B. and A. 465.

(b) The argument upon the mere technical objections arising on the pleadings, it is unnecessary to detail.

1824.

DUNCAN v. THWAITES.

ABBOTT, C. J.—This was an action for the publication of two supposed libels. The defendants pleaded several special pleas to the declaration, to some of which the plaintiff has demurred. The demurrer was argued before us at the Sittings in *October* last. The judgment I am now about to deliver is to be considered as the judgment of my learned brothers, *Bayley* and *Holroyd*, and myself. My learned brother *Littledale* took no part in the discussion, he having previously been concerned for one of the parties while at the bar. The declaration contains a great number of counts, but it will be sufficient for the purpose of our present judgment, to consider the counts as divided into two classes, and each class subdivided into two branches. The first class consists of those counts which are preceded by an introductory averment of a proceeding before the justice. The second class contains those counts which have no such introductory averment. The first branch of each class will comprise the counts founded on the publication of the 10th *July*, and the second, the counts founded on the publication of the 16th *July*. According to this distribution it will not be necessary to advert particularly to any except the first and thirteenth counts. (After stating the substance of those counts, the learned Judge proceeded.) The defendants have pleaded the general issue, and also some pleas of justification, averring the truth of the facts, that is, of the supposed assault, on which pleas issues have been joined. To the second, third, fourth, fifth, sixth, seventh, and eighth pleas, the plaintiff has demurred. The third plea alleged very shortly, that the several matters and things in the supposed libels contained, were and are true. That is the whole of the third plea. Now this plea is evidently bad, because it is uncertain whether it be thereby meant to allege that the report in the newspaper is a true report of the proceedings, or that the facts mentioned in the report, are true, and if the latter be meant, the plea is much too general. The fourth plea is also pleaded to the whole declaration, and that is as follows:—"That the plaintiff ought not to

have or maintain his aforesaid action, because the defendants say, that the said supposed libels respectively contained nothing but fair, true, and correct reports in the said newspaper, called the *Morning Herald*, of proceedings which took place publicly and openly before the said *Thomas Halls*, so being such justice as aforesaid, at the public police office at *Bow Street* aforesaid." Now as one class of the counts in the declaration has not alleged any proceedings before a justice, it was at least necessary, in a plea to that class, to aver and shew distinctly, that proceedings had taken place before a justice, and to do this with the formality and certainty required in pleading; and if the plea is bad as to any part of the matter to which it is pleaded, then it is bad as to the whole, according to general rules. The fifth plea is pleaded to the first branch only of the two classes of counts, or, in other words, to the supposed libel of the 10th *July*. It alleges that the plaintiff was brought before the magistrate and examined, and that on that occasion *Ann Chandler*, the mother, *Ann Chandler*, the daughter, *Ann Duncan*, and *Lewis Desormeaux*, were examined, and that each of them deposed as set forth at large in this fifth plea; and then the plea goes on to allege—" wherefore the defendants published the supposed libel as and for, and being, a true, fair, just, and correct report and account of the said proceedings." But, upon the face of the plea itself, it is manifest that it is not a true, fair, just, and correct report and account of the proceedings, for, without noticing other objections, the report wholly omits the deposition of *Lewis Desormeaux*, in which he deposes that to a question proposed by him to the girl *Ann Chandler*, as to a material fact, of which, before the justice, she swore to the affirmative, she distinctly answered " No, he had not;" and the same question being put to her over and over again, she always repeated " No." No notice is taken of that deposition of the girl, or of that contradiction, in the report in the newspaper, and therefore it cannot be considered as a true and correct report, inasmuch as it omits this important

1824.
DUNCAN v. THWAITES.

circumstance. The sixth plea is pleaded only to the supposed libel of the 15th *July*, which alleges that the plaintiff was examined at the police office, and ordered to enter into recognizances; and the plea avers that the plaintiff was so examined, and that he was ordered to enter into such recognizances, and as this libel contains no detail of the evidence, nor any comment on the case, but nakedly states the fact of what the justice thought fit to do, we think this is a good plea. And the eighth plea, being also pleaded to part only of that second supposed libel, we think that also is a good plea for the same reason. The seventh plea is pleaded to a part only of the supposed libel of the 10th *July*, and in all other respects it resembles the fifth plea, on which our opinion has been already given.

It remains only to consider the second plea, which was very properly treated in the argument for the defendants as the most important plea in this case. Now that plea states "that before any of the said several times when, &c. to wit, on the 8th day of *July*, 1823, at the public office at *Bow Street*, before the said *Thomas Halls*, so being such justice as aforesaid, the plaintiff did undergo a long examination, on a charge of having indecently assaulted a female child of only thirteen years old, to wit, one *Ann Chandler*, and attempting to violate the person of the said *Ann Chandler*, and the evidence of the child herself, and her companion, the plaintiff's own cousin, of the same age, did upon that occasion then and there display a complication of disgusting indecencies, although the plaintiff then and there denied the principal facts alleged, and the children made some slight variation in their evidence, and eventually the plaintiff was on that occasion then and there admitted to bail, himself in 100*l.* and two sureties in 50*l.* each, for the appearance of him, the said plaintiff, again on *Tuesday* then next following. And that afterwards, to wit, on *Tuesday* the 15th day of *July*, in the year aforesaid, at the said public office in *Bow Street* aforesaid, the plaintiff was again examined before the said *Thomas Halls*, so being such justice as aforesaid, touch-

ing the said charge, but no further evidence was heard, and he, the said plaintiff, was then and there ordered by the said justice to enter into recognizance to the amount of 200*l.* for his appearance at the sessions, and all the witnesses were bound over to prosecute. And that the said several supposed libels, in the said declaration mentioned, contained and contain no other than a true, fair, and just report and account of the proceedings which took place on the said 8th and 15th days of *July* respectively, at the said public police office at *Bow Street* aforesaid, on the respective occasions aforesaid, and were printed and published by the defendants in the said newspaper, called the *Morning Herald*, with no scandalous, malicious or defamatory, unworthy or unlawful motive whatever, and that the said proceedings therein reported, as aforesaid, took place as aforesaid, publicly and openly at the said police office, and the said reports or accounts thereof, composing the said supposed libels, were so printed and published as aforesaid, in the said newspaper, as public news of such public proceedings, and with no other intent and for no other object or purpose whatsoever." That is the whole of the second plea. Now this plea is founded on the supposition that it is lawful for the editor of a public journal to publish accounts of proceedings taking place before justices of the peace by way of preliminary inquiry, and with a view to commit to prison, or otherwise make amenable to justice, persons against whom charges are preferred before the justices, and to do this where the proceeding terminates by commitment or bail, and before the intended trial can take place, provided the proceedings themselves are conducted openly, and the accounts are just and true. This proposition was strongly contended for in the argument on behalf of the defendants, and it was inferred, from the supposed legality of such publications, that no action can be maintained by the person thus accused, whose character and reputation may be injured by the publication.

This case was argued before us with much learning on

1824.
DUNCAN v. THWAITES.

both sides, and all the decisions and opinions of Judges, that have any bearing on the question, were quoted on the one side or the other. It would be an unnecessary employment of the time of the Court to comment on all these authorities. It is sufficient to say that there is not one of them which plainly supports the affirmative of this proposition, and that there are many expressly declaring the negative. The case approaching nearest, and certainly approaching nearly, to the affirmative, is that of *Currie* v. *Walter*, reported in 1 *Esp.* 456, and 1 *Bos.* and *Pul.* 522. That case, which is undoubtedly a great authority in itself, derives additional weight from the manner in which it is mentioned by Mr. Justice *Lawrence*, in the subsequent case of *Rex* v. *Wright*; but it has not received the sanction of subsequent judges, and it differs in some important facts from the present case. It was an account of a proceeding in this Court—a Court instituted for final determination, as well as preliminary inquiry, and whose doors are, as they ought to be, open to as many of the public as can be conveniently accommodated within its walls. The proceeding now in question was before justices of the peace, and was of a kind which they may lawfully conduct in private, whenever they think fit so to do. That proceeding, which was the foundation of the action in *Currie* v. *Walter*, terminated by a refusal of the application, and not by putting the subject into a train for further inquiry and trial. The proceeding in question terminated, in the first instance, by holding the accused to bail for his future appearance before the justice, and finally, by holding him to bail to take his trial before a jury. Such a trial therefore might be expected at the time of each of the publications. This Court has on more occasions than one, within a few years, been called upon to express its opinion judicially on the publication of preliminary and ex-parte proceedings, and has on every occasion delivered its judgment against the legality of such proceedings, as was done by Mr. Justice *Heath*, in the year 1804, in the case of *Rex* v. *Lee* (*a*). Other Judges have delivered

(*a*) 5 Esp. 123.

opinions to the same effect, and it is well known that many other persons have lamented the inconvenience and the mischievous tendency of such publications. They were, within the memory of many persons now living, rare and unfrequent. They have gradually increased in number, and now unhappily are becoming very frequent and numerous; but they are not on that account the less unlawful, nor is it less the duty of those to whom the administration of justice is entrusted, to express their judgment against them.

I have pointed out some distinction between this case and *Currie* v. *Walter*, but we wish it not to be inferred from thence, that we think the publication of ex-partè proceedings, even in this Court, is to be a matter allowable by law; but that point will remain to be considered whenever the question shall properly arise; it does arise in this case.

It was further contended, that even supposing publications of this kind to be so far unlawful as to render their authors amenable to the criminal law, by reason of the public inconvenience and mischief, yet that the party himself could not maintain a civil action in respect of such publications, or at least that the plaintiff was barred of his action in the present case by the denial of malice, which denial was supposed to be admitted by the demurrer. If, however, a plea is bad in law, a demurrer admits no fact alleged in it. I take it to be a general rule that a party who sustains a special and particular injury, by an act which is unlawful on the ground of public injury, may maintain an action for his own special injury; and if publications like the present tend to prevent or impede the due administration of justice towards persons accused of offences, it is impossible to say that the individual, whose trial may be affected by them, does not sustain a special and peculiar injury even in that view; and he certainly sustains an injury to his character of the same nature as the injury to any other person by any other species of defamation. I take it to be a general rule, that every act, unlawful in itself and injurious to another, is considered in law to be done malo animo towards

1824.
Duncan
v.
Thwaites.

the person injured; and this is all that is meant by a charge of malice in a declaration of this sort, which is introduced rather to exclude the supposition that the publication may have been made on some innocent occasion than for any other purpose. There are some acts which in themselves are not unlawful, but which become so only by reason of their injury to others, which in all civil actions are charged to be maliciously done. Take the common case of an offensive trade, the melting of tallow for instance, which is a trade not in itself unlawful, but if it be carried on to the annoyance of the neighbouring dwellings, it becomes unlawful with respect to them, and the inhabitants may maintain an action, and may charge the act of the defendant to be malicious; and no one ever objected to such a charge, although probably the defendant, in most cases, has no personal malice towards his neighbours, but acts only with a view to his own profit and gain. The publication in question impeaches the plaintiff's character: a publication impeaching private character is actionable, unless the occasion of publishing makes the publication excusable; and where the publication is a violation of the criminal jurisprudence of the country, and there is nothing to call for it, the publication is not excusable. These observations upon the plea are an answer also to the objections that were taken to the declaration, for if the facts stated in the plea do not furnish a defence, the introductory averments, even in those counts that contain such, do not shew that the action is not maintainable. The judgment of the Court, therefore, will be for the plaintiff upon the demurrer to all the pleas I have named, except the sixth and eighth, upon which the defendants are entitled to judgment.

The judgment was ordered to be entered accordingly.

END OF MICHAELMAS TERM.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

HILARY TERM,

IN THE FIFTH AND SIXTH YEARS OF THE REIGN OF GEORGE IV.

The KING v. The Ma , Masters and Councillors of TOTNESS.

1825.

Monday, January 24.

Mandamus refused to compel a corporation to meet for the purpose of considering the propriety of removing non-resident members, where the charter in terms required residence.

J. EVANS moved for a rule calling on the Mayor, &c. of *Totness*, to shew cause why a mandamus should not issue to them, commanding them to assemble themselves together within the borough, and consider of the propriety of removing certain persons, by name, from the office of masters and councillors of the said borough, on the ground of non-residence. It was stated in the affidavits in support of the motion, that of fourteen masters and councillors chosen under the charter, but ten resided within the borough; that of these, four were unable to attend corporate meetings from age and infirmity; that by the charter the presence of eight masters and councillors was necessary to constitute a corporate meeting, and that the charter, in terms, required that the masters and councillors should be resident within the borough. Two instances were mentioned in which masters and councillors had been removed from their office, on the ground of non-residence. Great inconvenience was suggested as arising to the inhabitants from the infrequency of corporate meetings, by reason of the non-residence of

1825.
The King v. Totness.

members, and the illness of others, who were unable to attend; and it was alleged, that such meetings were only called when they suited the interests or convenience of the resident masters and councillors. This case, it was urged, was much stronger than *Rex* v. *The Mayor of Portsmouth* (a), because here the charter in terms required that the masters and councillors should be resident. [*Abbott*, C. J. But the difficulty is, that supposing a meeting of the corporation is called, and they do not chuse to remove the non-resident members, what benefit will be derived from this application? If they refuse to amove, a mandamus will afford no remedy whatever for the alleged evil.] If a legal meeting is called, and they do not think proper to amove, then they will subject themselves to a criminal information. [*Abbott*, C. J. I am not satisfied of that.] The charter requires that the masters and councillors shall reside. It is a duty imposed upon them, and if they neglect to perform it, they are liable to amotion; and if those whose duty it is to amove refuse so to do, a criminal information will lie. In granting the charter to this corporation, the crown must be supposed to have done so for a beneficial purpose, with a view to the interests of the inhabitants, but if the members of the corporation have disqualified themselves by non-residence, that purpose must fail. If the Court refuses this application, the effect will be that this corporation will cease to be of any use for the purposes for which it was originally incorporated. This is the strongest case which has been presented to the Court. The charter requires that the masters and councillors shall be inhabitants, and the public sustain a real inconvenience from the non-residence of some of the members. This is a very important question, and deserves at least more serious consideration than can be given it on motion. [*Abbott*, C. J. The Court has been of opinion, and is still of opinion, that if it were to assume to itself the power of granting applications of this kind it would exceed its jurisdiction. This Court never thought of entertaining such an application until very lately indeed. In former

(a) Ante, vol. iv. 767.

times no instance of the kind is to be found. If we were now to accede to it, we should be opening a door to litigation which would be quite endless.] The absence of precedents may be accounted for, by observing that in former times corporators were more astute in upholding their corporate rights than in modern times. The only remedy for the grievance complained of is by mandamus. Until *Rex* v. *Heaven* (a), it was thought that a quo warranto information would lie for non-residence, but that case decides, that, until the corporate officer is removed, such an information will not lie. Unless, therefore, a mandamus issues, this corporation will become useless. There is no other method of compelling the corporators to do their duty. It is an unquestionable rule of law, that whenever a corporate body is guilty of a breach of duty, this Court will set them in motion. Here there has been a breach of the charter, and this Court has authority to compel the execution of its provisions.

Abbott, C. J.—The question is not properly, what the members of this corporation ought to do, but whether this Court has power to do that which is now required of us. It is extremely difficult to define the precise limits of our authority; but it is our duty to take care not to exceed that which is a reasonable limit. In governing our discretion we must refer to that which has been the ancient practice of the Court; and certainly the ancient practice has been not to grant applications of this kind. Under circumstances like the present, I think we ought not to take upon ourselves to establish a precedent, so likely to be attended with serious inconvenience. Speaking individually, I should be extremely unwilling to take upon myself the authority which the Court is now called upon to exercise.

Holroyd, J. (b) and Littledale, J. concurred (c).

(a) 2 T. R. 772. (b) *Bayley*, J. was gone to chambers.
(c) See *Rex* v. *The Mayor of West Looe*, ante, 414.

1825.

Monday January 24.

Mandamus granted to the steward of a manor to allow inspection of the court rolls to two tenants, litigating a right of common in the manor, although the cause was not at issue.

ROGERS *v.* JONES.

R. V. RICHARDS moved to discharge a rule obtained last term for a mandamus to the steward of the manor and lordship of *Writhin* in *Denbighshire*, commanding him to allow the plaintiff an inspection of the rolls of the manor as far as they related to the matters in issue in this cause. Both parties were freeholders and tenants of the manor of *Writhin*, doing suit and service to the lord. The plaintiff had declared in trespass, quare clausum fregit, to which the defendant pleaded a prescriptive right of common over the locus in quo. Issue had not been joined at the time the rule for a mandamus was obtained, and it was now contended, first, that in point of practice the mandamus could not issue in the present stage of the proceedings, and second, that as far as they had gone, no question appeared to be involved in the cause, which could justify an inspection of the court rolls.

PER CURIAM.—Whether the rule nisi for a mandamus was regularly obtained in the first instance, it is unnecessary to decide, but we are clearly of opinion that it is for the interest of all parties that it ought to issue.

Rule refused.

Monday, January 24.

MAYHEW and another *v.* EAMES and another.

ASSUMPSIT against the defendants, as common carriers, to recover the value of a parcel containing provincial bank-notes to the amount of £87, entrusted to their care, safely

Where the agent of a mercantile house sent bank-notes, by a common carrier, to his principals, and the parcel was lost:—Held, that the carrier was not liable, the principals being aware (though the agent was not) that the carrier had previously given public notice of non-liability for such property.

to convey the same from *Downham*, in the county of *Norfolk*, to *London*, but which was lost by the negligence of them and their servants. Plea, non-assumpsit, and issue thereon. At the trial before *Abbott*, C. J. at the *London* adjourned sittings after last term, it appeared in evidence that, on the 10th of *February*, 1824, at *Downham*, in *Norfolk*, one *Hughes*, traveller to the plaintiffs, who are warehousemen in *London*, having collected on their account £87, in country bank-notes, enclosed them in a parcel which he addressed for the plaintiffs, "*Foster Lane, Cheapside, London;*" and on one corner of the parcel he wrote the word "mourning." He then delivered the parcel to *Wright*, the keeper of the *Castle* Inn, at *Downham*, for the purpose of being forwarded to *London* by the defendants' *Lynn* coach, which stopped at the *Castle* for the purpose of changing horses. He paid *Wright* 1s. 2*d.* for the carriage of the parcel, and obtained a receipt for it, but did not acquaint him with its value. When the coach arrived, *Wright* delivered the parcel to the coachman, but it never reached its destination. The defence set up was, that the plaintiffs having had notice of the defendants' non-liability, the action was not maintainable. It was proved that before the 10th of *February*, 1824, the plaintiffs were in the habit of receiving parcels by coaches coming to the *White Horse Inn, Fetter Lane, London*, which was the destination of the defendants' *Lynn* coach, and that the porter of the inn when he delivered such parcels always left with them a ticket or invoice, containing the amount of charge for carriage and porterage and a printed notice, signed by "J. Eames," one of the defendants, "that the proprietors of carriages which set out from this office will not hold themselves accountable for any passenger's luggage, truss, parcel, or any package whatever, above the value of £5, if lost or damaged, unless the same is entered as such and paid for accordingly when delivered here, or to their agents in town or country; nor will they be accountable for any glass, china, plate, watches, writings, cash, *bank-notes*, or jewels of any description,

1825.
MAYHEW v. EAMES.

however small the value." There was no proof that *Hughes*, the plaintiffs' traveller, knew of this notice at the time he delivered the parcel to *Wright* at *Downham*, but he stated, from his own knowledge, that the plaintiffs were in the habit of receiving parcels by the defendants' coaches. Under these circumstances the Lord Chief Justice, being of opinion that knowledge of the defendants' notice of non-liability was brought home to the plaintiffs, thought the action not maintainable and directed a nonsuit, but gave the plaintiffs leave to move to enter a verdict for £87.

Denman, C. S. now moved accordingly. In order to defeat this action it must be made apparent that the plaintiffs had personal knowledge of the notice by which the defendants seek to evade their common law liability. No such knowledge was brought home to them. Assuming that their traveller had such notice, that is not sufficient to bind them. But the fact is, that the traveller who entered into the contract for the safe delivery of the parcel had no knowledge whatever of such notice. Admitting that the plaintiffs knew the course and practice of the coach-office in *Fetter Lane*, still it is impossible to incorporate the notice accompanying the delivery of other parcels, with the contract for the safe delivery of the parcel in question, in order to qualify its operation. Besides, the notice here relied upon has reference to the luggage of *passengers* only, and, at all events, it professes to be a notice by Mr. *Eames* for *all* the proprietors of coaches setting out *from* the *White Horse* Inn, which it was not competent for him to give. The notice, for the purpose of being available, must apply to this specific transaction, and be given by the defendants jointly, or by their authorized agent, to the person entering into the contract. Here no such notice was given, and the plaintiffs have a right to look to the defendants' common law responsibility as carriers.

ABBOTT, C. J.—The plaintiffs' own traveller said he knew that the plaintiffs were, before this transaction, in the

habit of receiving parcels by this coach, and that the parcels delivered by the porter from the *White Horse* Inn, were always accompanied by a ticket similar to that given in evidence. That circumstance, confirmed as it was by the evidence for the defendants, satisfied my mind that the plaintiffs were fully aware that the defendants did not hold themselves accountable for bank-notes sent by their coaches; and, therefore, I was of opinion that it was their duty to direct their traveller not to send such property by the defendants' coaches, or if he did, to apprize the proprietors, or their agents, of the nature of the property so intended to be transmitted, in order that they might have their option whether they would run the risk of carrying such property. On that ground I directed a nonsuit. My learned brothers will say whether I did right.

BAYLEY, J.—I think the nonsuit was right. In order to entitle common carriers to the protection of a notice of restricted liability, it must be shewn that the person who sends the goods has knowledge of the existence of such notice; but the knowledge of the principal is the knowledge of the agent employed to transmit the goods. Here there is distinct evidence that the plaintiffs themselves knew that the defendants would not hold themselves accountable for bank-notes lost in the course of transmission by their coaches. It appears that, on all occasions, when parcels were delivered from the *White Horse* Inn, a notice was sent with them that the proprietors of coaches setting out from or coming to that inn would not be accountable for bank-notes. If, therefore, the plaintiffs knew that the defendants would not be accountable for such property coming by their coaches, it was their duty to give a proper caution to their traveller, and direct him to send his money parcels by some other conveyance. Instead of which they suffer the traveller to send this parcel by the defendants' coach, whereby it is lost. It appears to me, therefore, that the plaintiffs having acted without due caution, and at their own risk, the defendants are not liable for the consequences.

1825. MAYHEW v. EAMES.

Distinct notice is brought home to the plaintiffs; and a notice to the principal is sufficient to protect the carrier, whether the agent has notice or not. There may not have been sufficient evidence here to fix the traveller with personal notice; but I think that was not necessary.

HOLROYD, J.—I am of the same opinion. I think the knowledge of the principal in *London* must be considered the knowledge of the agent in the country. I have some doubt whether it should not have been left to the jury to say whether the plaintiffs had notice or not; but I think, upon the evidence that these notices had been left several times before at the plaintiffs' house, when goods were delivered, it must be considered that the plaintiffs had notice of the defendants' restricted liability, although the notices may not have actually come into their own hands. Delivery of such notices to their servants on the premises would, in my opinion, be the same as if they were delivered into their own hands. This being property described in the notice, I think the nonsuit was right, assuming that, in point of fact, the plaintiffs had had sufficient notice of the defendants' course of business.

LITTLEDALE, J.—I think the delivery of tickets to the plaintiffs in the manner proved in evidence, was abundant notice of the defendants' restricted liability. Notice to the principal must be considered as notice to the agent. I know of no case in which it has been held that a notice to the principal is not, in point of law, a notice to the agent. Here the plaintiffs had notice before the 10th of *February*, 1824, that the defendants would not hold themselves accountable for bank-notes, which are the subject of this action, and I think that is sufficient to exonerate the defendants, though the plaintiffs' traveller may not have been privy to such notices.

Rule refused (*a*).

(*a*) Vide *Beck* v. *Evans*, 16 East, 244. 1 H. B. 298. 4 East, 370. 3 Taunt. 264.

The KING v. WARNFORD.

Tuesday, January 25.

Mandamus lies to justices to amend the record of a game conviction, by setting out the evidence on which it is founded, as nearly as possible in the words used by the witnesses.

CHITTY, in *Michaelmas* Term, obtained a rule calling upon a justice of the peace for the county of *Wilts*, to shew cause why a mandamus should not issue, directed to him, commanding him to amend the record of a conviction on the game laws, by setting out the evidence on which the conviction was founded, as nearly as possible in the words used by each of the witnesses examined before him, in pursuance of the 3 *Geo.* 4. c. 23., it being suggested that the record, as it stood at present, made the witnesses swear in the technical language of the statute, and not in the words alleged to have been used by themselves.

Merewether now shewed cause and contended, that the justice, having once drawn up the conviction, had no control over and could not alter it. He had always understood it to be an universal rule that a conviction once made matter of record could never be altered; and if erroneous, the relief could only be by appeal to the sessions. The question was whether the Court had authority to grant a mandamus in such a case for such a purpose, and he submitted that it would be a dangerous practice to allow justices in any case to alter their conviction. In *Re Rix* (*a*) the Court undoubtedly granted a mandamus for such a purpose, but the objection now taken was not suggested, it being agreed, as matter of arrangement, that the evidence should be set out in order to raise a question of importance on the construction of the building act. Besides, in this case the justice would have difficulty in setting out the evidence, if the minutes taken at the hearing of the information were lost or mislaid. The statute on which this motion was founded had very recently come into operation, and that may be the reason why the justice had not set out the evidence in the

(*a*) Ante, vol. iv. 352. See *Rex* v. *Marsh*, id. 260.

1825.

The King v. Warnford.

words used by the witnesses. [*Bayley*, J. But before that statute the justices were bound to set out the evidence.] Not in the very words.

Abbott, C. J.—Nor are they now bound to set out every word. All that is required of them is, to set out the evidence as nearly as possible in the words used by the witnesses; that is, the substance and effect; but not every word. Here it is suggested that the witnesses are made to speak in the language of the act of parliament. No illiterate witness, nor indeed any witness, would say, that the defendant "did use a certain engine called a gun, and a certain dog called a pointer, to kill and destroy the game." The conviction must set out the language used by the witness, in order that it may be seen whether a right conclusion is drawn from it. The Court will not assume that the justice has done his duty unless he tells us so by his own acts. This is an imperfect record, and ought to be amended.

E. Alderson, amicus curiæ, mentioned that this very point had been decided in *Rex* v. *Allen* (*a*), in the case of a game conviction drawn up by the magistrates at *Union Hall*, and the Court ordered a mandamus to have the evidence set out.

The Court considered the objection not maintainable, and therefore made the

Rule absolute.

(*a*) Not reported.

Tuesday, January 25.

Dobell *v.* Stevens.

If by false and fraudulent representations a party is induced to enter into a written agreement, and is thereby damnified, he may maintain case for the deceit, and give parol evidence of the representations, although they are not noticed in the written contract.

CASE for a deceitful representation respecting the sale of a public-house. The first count of the declaration stated, that before the time of committing the grievance thereinafter

mentioned, defendant kept a public-house, and was possessed of a lease thereof for a certain term of years, and thereupon plaintiff, at the request of defendant, on &c. at &c. was in treaty with defendant to purchase his interest in the said house for a certain sum of money, to wit, the sum of £460, and also to purchase the household furniture and fixtures, and stock in trade, at a valuation; and defendant falsely, fraudulently, and deceitfully pretended and represented to plaintiff that the returns or receipts for the spirits sold in the said public-house had been and then amounted to the sum of 160*l.* per month; and that the quantity of porter sold in the house amounted to seven butts per month; and that the tap was let for 82*l.* per annum, and two rooms in the public-house for 27*l.* per annum; and by such representation then and there induced said plaintiff to purchase said lease of the house at the price of 460*l.* Averment of the falsehood of this representation in all its particulars. There were other counts varying the mode of stating plaintiff's cause of action. Plea, not guilty, and issue thereon. At the trial before *Littledale*, J. at the *London* adjourned sittings after last term, it was proved that, pending the plaintiff's treaty with the defendant for the purchase of the premises in question, the latter had made the representations stated in the declaration, which the plaintiff afterwards discovered to be false. It was admitted by the plaintiff's witnesses on cross-examination, that at the time of the treaty the defendant's books of accounts, shewing the real quantity of porter and spirits sold, were in the house, and might have been inspected by the plaintiff had he been so minded, but which, however, he had neglected to do. After the treaty was closed, a written memorandum of the bargain was drawn up and signed by both parties, and an assignment of the lease was also executed. Both these instruments were perfectly silent as to the representations by which the plaintiff was induced to make the purchase. Under these circumstances the learned judge told the jury that if they were of opinion that the representations as to the value of the

1825. DOBELL v. STEVENS.

premises and the quantity of porter and spirits sold were fraudulent, the plaintiff would be entitled to a verdict, notwithstanding the terms of the bargain had been reduced to writing. The jury found for the plaintiff.

Gurney now moved for a rule to shew cause why the verdict should not be set aside and a new trial granted. The terms of the bargain by which the parties agreed to be bound in this case having been reduced to writing, the plaintiff was not at liberty to go into parol evidence of the representations which had induced him to make the purchase. The parties were concluded by the written evidence of their bargain, and it was not competent to either to go into collateral proof for the purpose of adding to or varying its import. For this *Pickering* v. *Dowson* (*a*) seems an express authority. There it was held that if a representation be made before a sale of the quality of the thing sold, with full opportunity for the purchaser to inspect and examine the truth of the representation, and a contract of sale be afterwards reduced into writing, in which that representation is not embodied, no action for a deceit lies against the vendor on the ground that the article sold is not answerable to that representation. That case seems expressly in point with this. Here the plaintiff had had full opportunity of ascertaining by reference to the defendant's books of account whether his representation was true, and having neglected to do so, he is concluded by his written contract, and cannot afterwards impeach the bonâ fides of the transaction. [*Abbott*, C. J. But in that very case, *Gibbs*, J. says, " In this case *if there had been any fraud*, I agree it would not have been done away by the contract; but in this case there is no evidence of any fraud at all."—*Bayley*, J. In *Kain* v. *Old* (*b*), the same principle was recognized by the Court, for *Abbott*, C. J. in delivering the judgment of the Court says, " Matters existing before the contract was complete, or matters dehors the contract, may, under some circumstances, be

(*a*) 4 Taunt. 779. (*b*) Ante, vol. iv. 52.

admissible as evidence in its support, and to shew the inducement of it, but the vendee is never at liberty to give such matters in evidence, except when he can prove that the vendor has been guilty of a fraud in concealing a defect with which he himself was acquainted, and which ought in justice to have been communicated to the other party."] But still that doctrine will not apply to a case where the party supposed to be deceived has the opportunity of detecting the fraud. In this case the plaintiff had the opportunity of exercising his own vigilance and guarding against any fraud, and having neglected so to do he is concluded. Upon this principle it was held in *Powell* v. *Edmunds* (a), that if an auctioneer makes a statement at a public auction respecting the article sold, which statement is not noticed in the conditions of sale, parol evidence of such statement is inadmissible. In that case Lord *Ellenborough*, C. J. observed, "If the parol evidence were admissible in this case I know of no instance where a party may not, by parol testimony, superadd any term to a written agreement; which would be setting aside all written contracts and rendering them of no effect. The only question which could be made is, whether, if by a collateral representation a party be induced to enter into a written agreement different from such representation, he may not have an action on the case for the fraud practised to lay asleep his prudence." The admissibility of such evidence is, however, so doubtful, that the point may well be the subject of more mature deliberation in a case where it distinctly arises.

ABBOTT, C. J.—The question whether there had or had not been any fraud practised upon the plaintiff was peculiarly within the province of the jury to decide, and they have found for the plaintiff on that point. On the present occasion no objection is suggested as to the mode in which the case was left by the learned judge for the consideration of the jury. If then the present motion for a new trial

(a) 12 East, 6.

1825.
Dobell v. Stevens.

can be sustained, it must be on the ground, that there having been a written agreement or conveyance of the premises afterwards entered into between the parties, in which no notice is taken of the representations made at the commencement of the treaty, no evidence ought by law to be received of such representations, or of any fraud in the transaction. That is the ground of the present application. Now the case of *Lysney* v. *Selby* (*a*) establishes a doctrine directly contrary to that position, and the decision itself is precisely analogous to the present case. That was an action against the defendant for falsely and fraudulently representing to the plaintiff that certain houses of the defendant were then demised at the yearly rent of 68*l*., to which the plaintiff giving credit, bought the houses for a large sum of money, to wit &c., and a conveyance was afterwards executed to him; whereas, in truth and in fact, the houses were at that time demised at the yearly rent of 52*l*. 10*s*. and no more. In the conveyance no notice was taken of the amount of the rent. An objection was taken in arrest of judgment, after verdict for the plaintiff, that the declaration did not shew that the false representation was made at the time of the sale, and consequently the action was not maintainable; but the Court held otherwise, and Lord *Holt* says, "If the vendor gives in a particular of the rents, and the vendee says he will trust him, and inquire no farther, but rely upon his particular, then if the particular be false an action will lie." In the present case the plaintiff, relying on the truth of the representation made by the defendant, was thereby induced to become the purchaser of the premises. The representation was not of any matter or quality belonging to the thing sold, and therefore likely to appear in the written conveyance; but of a matter or quality wholly collateral, namely, the quantity of business carried on in the house. So also in *Lysney* v. *Selby* the amount of rent was collateral to the thing sold. I know of no decision in which the authority of that case has been

(*a*) 2 Ld. Raym. 1118.

questioned, and it appears to me to be exactly in point with this, and the jury having found that that which was untruly represented, was fraudulently and deceitfully represented, it seems to me that we ought not to disturb their verdict.

Bayley, J., Holroyd, J., and Littledale, J., concurred.

Rule refused (*a*).

(*a*) See *Woodbridge* v. *Spooner*, 1 Chit. R. 661.

Buckle *v.* Bewes.

Wednesday, January 26.

Where the sheriff retained out of the proceeds of a sale, under an execution, the expenses occasioned by keeping possession of the goods under an injunction out of *Chancery*:—Held, that this was an indirect taking of more than the poundage allowed by 29 *Eliz.* c. 4., and that he thereby incurred the penalties of that statute.

THIS was an action against the sheriff of *Devonshire* for a false return to a writ of fieri facias. The first count of the declaration, after stating that plaintiff had recovered a judgment, and had issued a fi. fa. thereon, directed to the defendant as such sheriff, and that the defendant had seized goods, and levied money thereon, charged the defendant with wrongfully retaining a part of the money. There were other counts to the same effect. The last count, which was upon the 29 *Eliz.* c. 4., for extortion, after alleging the judgment, the fi. fa. and levy as aforesaid, proceeded to aver "that the said defendant, so being sheriff as aforesaid, not regarding his duty as such sheriff, nor the statute in such case made and provided, afterwards, to wit, on &c., at &c., by reason and colour of his said office of sheriff, wrongfully, illegally and oppressively had, received and took, indirectly, of and from the said plaintiff, for the serving and executing of the said last mentioned execution, more and other consideration and recompense than in the statute in that case made and provided is limited and appointed in that behalf, that is to say, by deducting from the monies so levied, which were before such deduction insufficient to satisfy the said last mentioned damages, a large sum of money, to wit, 50*l.* 5*s.* more than in the said statute is

1825.

Buckle v. Bewes.

limited and appointed, whereby the said plaintiff is damaged and aggrieved to the amount of that sum of money, contrary to the form of the statute in such case made and provided. The defendant having suffered judgment by default, a writ of inquiry of damages was executed. Upon the execution of the writ of inquiry, the return to the writ of fieri facias was given in evidence, by which the defendant stated, that after he had seized the goods of the defendant in the original action, and before the sale, he was served with an injunction out of the Court of Chancery, restraining him from selling the goods; that afterwards, upon the injunction being dissolved, he proceeded to the sale of the same, and after deducting the poundage and certain legal payments, he further stated "that he had retained 50*l.* 5*s.*, further part of the proceeds of the sale, for his necessary charges and expenses in and about the keeping possession of the goods, from the time when he was served with the injunction to the time of the sale, and that the residue of the money he had ready for the plaintiff." The whole proceeds of the sale were not sufficient to satisfy the amount of damages recovered against the original defendant, and directed to be levied by the indorsement on the writ of fi. fa. The jury gave one shilling damages on all the counts except the last, and on that 50*l.* 5*s.* damages.

Carter, for the purpose of relieving the defendant from the treble damages given by the statute 29 *Eliz.* c. 4., now moved for a rule nisi to set aside the inquisition upon all the counts except the last, and enter the damages upon them at 50*l.* 5*s.*, and to arrest the judgment on the last count. He submitted that the retention of the 50*l.* 5*s.*, which was for the necessary charges and expenses incurred in and about the keeping possession of the goods under the injunction, was not "having, receiving or taking" more fees than are allowed by the statute.

Abbott, C. J.—I think this is an indirect taking from the

1825.

BUCKLE v. BEWES.

plaintiff within the meaning of the statute, and though it may be a great hardship upon the sheriff, yet we cannot help him.

BAYLEY, J.—He does not actually take the money out of the pocket of the plaintiff contrary to the statute, and although it may be a bonâ fide taking, yet it is an indirect taking within the words of the statute.

HOLROYD, J. and LITTLEDALE, J. concurred.

Rule refused.

The KING v. LYON and another.

Thursday, January 27.

A right of way for all the king's subjects to pass and repass with their carts and carriages, is not restrained because *all* carriages cannot pass and repass.

Where a way has been recognized as public in an act of parliament for making streets, squares, &c. it is not necessary that it should be adopted by the parish to make it a public way.

INDICTMENT for not repairing a highway in the parish of *St. Pancras*, in the county of *Middlesex*. Plea, not guilty. At the trial before *Abbott*, C. J., at the *Middlesex* adjourned sittings after last term, it appeared in evidence that the place indicted formed a communication between *Sidmouth Street* and *James Street*, in the neighbourhood of *Gray's Inn Lane Road*, and was arched over, there being a dwelling-house over the arch. The archway was only nine feet in width and ten in height, through which it was proved that neither vans nor stage coaches could pass or repass. By an act of parliament passed in 1810, certain streets, lanes and squares built, or to be built, on land belonging to a Mr. *Harrison*, were directed to be paved by the commissioners for paving streets, &c. in the parish of *St. Pancras*. The way in question went over land belonging to Mr. *Harrison*, and before the passing of the act had existed as a way. It had, however, never been adopted or repaired by the parish, but had occasionally been mended with gravel by private individuals residing in the neighbourhood. On the part of the defendants it was objected, first, that the evidence did not support the description given of the way in the indictment,

1825.

The KING v. LYON.

inasmuch as all the King's subjects could not pass and repass with their carts and carriages as therein alleged; and second, that as there was no evidence of the parish having acquiesced in the dedication of the way to the public, it was not a public road which the defendants were bound to repair. The Lord Chief Justice overruled both objections, and the defendants were found guilty.

Abraham now moved for a new trial. The indictment alleges that the way in question was used for all the liege subjects of our lord the King and his predecessors, with their horses, carts and carriages, to go, return, pass, ride, and labour, at their free will and pleasure. The word "carriages" must mean, ex vi termini, *all* carriages. Now, it was proved that all carriages could not pass and repass, it being in evidence that neither vans nor stage coaches could pass and repass, and therefore there is a fatal variance, because the evidence only shews a limited right in the public; *Rex* v. *Marquis of Buckingham* (a). That was an indictment for not repairing a public bridge, over which it was alleged the King's subjects had a right to go "at their free will and pleasure," and it appearing in evidence that there was a bar across the bridge, which was kept locked except in times of flood, it was held that the public had only a limited right to use the bridge at such times, and consequently the variance was adjudged fatal. [*Bayley*, J. That case does not bear on this. The same point was afterwards brought before this Court in another case. If you claim a right to go over a way at all times of the year, and it appears in evidence that you are not entitled at some period of the year, then the indictment fails in proof. Here, all that is claimed is a right of way for all the King's subjects to pass and repass with their carriages; i. e. such carriages as the way will allow of passage.] Second, assuming that this is a way recognized by the act of 1810, and that it has been used by the public, still as there was no evidence that

(a) 4 Camph. 189

the parish had acquiesced in the dedication by repairing it or otherwise, it is not a public road which the parish are bound to repair. *Rex* v. *St. Benedict* (a). [*Bayley*, J. In that case the road was originally set out under an inclosure act, and the right to use it was limited to certain persons only, and though the public had used it for many years, the Court held that the mere use of it was not a sufficient evidence of a dedication of it to the public.]

1825. The King v. Lyon.

Abbott, C. J.—The first point is clearly not tenable. The allegation that this is a way for all the King's subjects to pass and repass with their carriages, means only that all the King's subjects have a right to pass with *such* carriages as the way will admit of passage. There are many lanes in the country which are not wide enough for a waggon to pass, but that would not make it the less a public way for all the King's subjects to pass and repass with their carriages; i. e. such carriages as the way will allow of passage. Here there was abundant evidence that all the King's subjects had passed and repassed with such carriages as the archway would allow. Then, as to the second point, it appears that before the passing of the act in 1810 there had been a way. The act itself recites that Mr. *Harrison* had formed a plan, and had entered into an agreement with the commissioners, for building certain streets and squares upon his land, and that it would be desirable that such streets and squares, when built, should be placed under the authority of the commissioners for paving *St. Pancras*; and then it points out the mode of setting out the footways and carriage ways, and the manner in which they are to be paved. This, amongst other ways, is recognized by the act. If it is said that because this particular way has not been recognized by the commissioners, by repairing it, the defendants are to be exempt from the liability to repair, the same objection would apply to any of the principal streets marked out by the act.

(a) 4 B. & A. 447.

1825.

The King v. Lyon.

Bayley, J.—The act of parliament makes this a public road, and therefore the adoption by the parish, to make it a public road, is not wanted.

Holroyd, J. and Littledale, J. concurred.

Rule refused.

Harvey and others, Assignees of Banck and Joseph, Bankrupts, v. Archbold and others.

Thursday, January 27.

A. in *London*, consigned goods to *B.* in *Gibraltar*, for sale on commission. *B.*, upon delivery of the invoice and bill of lading to his *London* agent, advanced through him, to *A.*, two-thirds of the invoice price of the goods by bills at ninety days' date, upon which he received 6*l.* per cent. interest from the date of the bills, that being the usual interest at *Gibraltar*. In assumpsit for the proceeds of the goods:—Held, that the advance was not a loan of money in *England*, and therefore not usurious, and might be proved as a set-off. Held, also, that in an action for money had and received, the plaintiff must prove to what specific sum he is entitled.

DECLARATION in debt and detinue. The counts in debt were, for money paid by the bankrupts before the bankruptcy, to the use of the defendants; for money had and received by the defendants to the use of the bankrupts; on an account stated between the bankrupt and the defendants; for money had and received by the defendants to the use of the plaintiffs as assignees, and on an account stated between the defendants and the plaintiffs as assignees. The counts in detinue were, for goods delivered by the bankrupts before the bankruptcy to the defendants to be re-delivered on request; on trover of goods the property of the bankrupts before the bankruptcy; and on trover of goods the property of the plaintiffs as assignees after the bankruptcy. Plea, the general issue, with notice of set-off for work and labour, for goods sold and delivered, for money lent, money paid to the use of the bankrupt, and money had and received by the bankrupt to the use of the defendants, before the bankruptcy. Issue thereon. At the trial before *Abbott*, C. J. at the *London* adjourned sittings after last term, the facts of the case appeared to be these. The bankrupts carried on business in *London*, and the defendants were merchants at *Gibraltar*. One of the defendants,

1825.
HARVEY
v.
ARCHBOLD.

Archbold, generally resided in *England*, but they had no place of business there. In the years 1821 and 1822, the bankrupts having consigned goods to the defendants at *Gibraltar* for sale on commission, the defendants agreed to advance through their agents, *Reid* and Co. of *London*, two-thirds of the invoice price of the goods, so soon as the invoices and bills of lading were from time to time remitted to them. These advances were to be made by bills at three months' date, drawn by the defendants on and accepted by *Reid* and Co., and the bankrupts were to be charged by the defendants with interest upon the bills at the rate of 6*l*. per cent. from their date; the defendants were also to receive a commission of 5*l*. per cent. upon some of the consignments, and of 3*l*. per cent. upon others, and a del credere commission of 2*l*. 10*s*. per cent. upon all, for the sales. This was the accustomed rate of interest and commission at *Gibraltar*. In pursuance of this agreement the parties had extensive transactions together. The advances by the defendants were all made in *England*, by bills at ninety days' date, drawn by them upon *Reid* and Co. The bills were never, in point of fact, accepted, but *Reid* and Co. advanced the amount in cash, after deducting 5*l*. per cent. discount. Bills upon *England*, at ninety days' date, are treated as cash in *Gibraltar*. In addition to these facts the plaintiffs put in evidence the account sales rendered by the defendants, but not the account current between the parties, and some letters between the parties, from which it appeared that there was a loss, the amount of which was not stated, upon each of the consignments. For the defendants it was contended, first, that the plaintiffs could not recover upon the counts in detinue, because they had given no evidence that any of the goods remained in specie, or that any demand had been made of them; and, second, that they could not recover at all, because as it was proved that the defendants had advanced two-thirds of the invoice price of the goods, and that there was a loss upon all the consignments, it must be presumed that the advances and the charges together exceeded the

1825.

HARVEY v. ARCHBOLD.

proceeds, and therefore that the balance was in favour of the defendants. For the plaintiffs it was urged that the advances could not be set off against the proceeds, because as the defendants had charged 6*l.* per cent. interest upon the advances, and their agents, instead of accepting the bills, had paid them in cash, deducting 5*l.* per cent. discount, the whole transaction was usurious, and the assignees were entitled to recover the whole amount of the proceeds. The Lord Chief Justice was of opinion that the facts of the case warranted the presumption that the balance of the accounts was in favour of the defendants, and that the transaction could not be considered usurious, unless it was part of the original agreement that *Reid* and Co., instead of accepting the bills, should pay them minus the discount; and that he left as a question of fact for the jury. The jury found that this was not part of the agreement, and then, under his lordship's direction, found their verdict for the defendants.

Copley, A. G. now moved for a new trial. The jury were directed to find their verdict for the defendants. That was wrong for two reasons, first, as the plaintiffs did prove the amount for which the goods sold, and the defendants did not prove the amount of the set-off, the plaintiffs were in point of law entitled to a verdict. Second, the advances made by the defendants were made upon usurious terms, and therefore could not legally form the subject of a set-off at all. The jury certainly found that it was not part of the original agreement that *Reid* and Co. should discount the bills, but independently of that the transaction was usurious, for the defendants received 6*l.* per cent. upon their advances. Upon contracts made in foreign countries, interest may be charged according to the rates allowed there; but that is only where the contract originates and is completed abroad.(*a*) But here the contract for the advances was made in *England*, the money was actually advanced in *England*, and it did not even appear that the defendants had in

(*a*) Vide *Comyn* on Usury, 8. and 152. and the cases there collected.

any instance remitted money from *Gibraltar* to *England* for the purpose of meeting those advances. This, therefore, was altogether an *English* contract, and, consequently, no more than 5*l.* per cent. interest could legally be taken upon it, whereas the defendants took 6*l.* per cent. interest, and, besides, calculated it not from the time when the bills became payable, but from the time when they bore date.

ABBOTT, C. J.—This was an action brought to recover the possession of certain goods placed in the hands of the defendants by the bankrupts before their bankruptcy, and also for money had and received. With respect to the former part of the case it is quite clear that the plaintiffs are not entitled to recover upon the counts in detinue, because they did not shew either that any of the goods remained in specie in the hands of the defendants, or that any demand had been made of them. With respect to the second part of the case, that rested entirely upon the account sales, for the plaintiffs did not produce the account current, but left it to the defendants to establish their set-off if they could. It has been argued that the defendants did not prove the amount of their set-off, but I am of opinion that they did, under the circumstances of the case, prove it sufficiently. It was in evidence that the defendants, through their *London* agents, *Reid* and Co., advanced two-thirds of the invoice price of all the goods consigned to them, and that all these goods were sold at *Gibraltar*, and that there was a loss upon every consignment. Upon that I think it is impossible to doubt that the advances made in *England*, and the charges upon the sales in *Gibraltar*, together amounted to more than the invoice price of the goods; and if so, the balance is in favour of the defendants, and they are entitled to a verdict. But supposing that not to be so, to what extent did the plaintiffs make out their claim? For what sum could a verdict for them have been entered? There was no evidence at all upon the subject; they left the state of the accounts wholly unexplained. But then it is

1825.

HARVEY v. ARCHBOLD.

said the defendants' charges were usurious and could not legally be set off. I was of opinion at the trial that the case ought to be regarded as if the agreement for the advances was made at *Gibraltar*, and not in *London*, and therefore that 6*l.* per cent. interest, being the rate allowed at *Gibraltar*, might legally be charged upon the amount of the bills from the time of their date. But I further thought that if it was part of the original agreement, that the bankrupts, instead of receiving bills accepted by *Reid* and Co. to deal with as they pleased, should receive from them the amount of the bills in cash, minus 5*l.* per cent. discount, that would render the contract usurious. The jury, however, to whom I left that as a question of fact, found that this was not part of the agreement, and then, as I was of opinion that the defendants were entitled to set off all their advances and charges, and that those, together, exceeded the proceeds of the goods, I directed a verdict to be entered in their favour; and, upon a reconsideration of the case, I am of the same opinion now, and still think that verdict right. But if the jury had found differently the plaintiffs would not have been benefited, for I should then have nonsuited them for the want of any evidence of any particular sum that they were entitled to recover.

BAYLEY, J.—There can be no usury where there is no loan; and I am of opinion that the advances made by the defendants cannot properly be regarded as a loan of money (*a*). The substance of the bargain seems to have been, that instead of waiting to remit the proceeds when actually realized by sales, the defendants should by anticipation remit such sums as the net proceeds would probably amount to. In such an arrangement I think there is nothing usurious, and therefore I altogether agree that there ought to be no new trial.

LITTLEDALE, J. (*b*) concurred.

(*a*) Vide *Gilpin* v. *Enderby*, ante, i. 570.
(*b*) *Holroyd*, J. was in the Bail Court.

1825.

PIDCOCK and others *v.* BISHOP.

Saturday, January 29.

Where a surety gave a guaranty to *A.* for a certain amount of goods to be sold to *B.*, and by a secret agreement between *A.* and *B.* the latter consented to pay 10*s.* per ton beyond the market price of the goods, in satisfaction of an old standing debt due to the former:—Held, that this secret agreement was a fraud upon the guarantee, and discharged his liability.

ASSUMPSIT on a guaranty given by the defendant for securing the payment of goods to the amount of 200*l.*, to be delivered to one *T. Tickell*. Plea, non-assumpsit. At the trial before *Hullock*, B., at the last *Lent* Assizes for the county of *Warwick*, it appeared in evidence that the plaintiffs carried on the business of pig iron manufacturers at *Lightmoor*, in *Shropshire*, and that the defendant was an iron-master at *Bankside, London*. The guaranty upon which the action was brought, was contained in a letter of the date 16th *December*, 1822, written by the defendant to the plaintiffs, and was in the following terms:—"At the request of Mr. *Thomas Tickell*, I beg to inform you that I will guaranty you in the payment of 200*l.* value, to be delivered to him in *Lightmoor* pig iron." Previously to the time this guaranty was given, Mr. *Tickell* had been in the habit of dealing with the plaintiffs, but had become bankrupt, and was indebted to the firm, and also on an old private account with Mr. *John Pidcock*, one of the partners. In *February*, 1823, the plaintiffs, on the faith of defendant's guaranty, supplied *Tickell* with twenty tons of *Lightmoor* pig iron, to the amount of 82*l.* 10*s.*, but he being unable to pay for it, this action was brought upon defendant's guaranty. The answer to the action was, that the defendant was discharged from his liability in consequence of a private agreement between *Tickell* and the plaintiffs, to which the defendant was not privy. Mr. *Tickell* was called on the part of the defendant, and he proved, that in the beginning of *December*, 1822, after his bankruptcy, he applied to Mr. *J. Pidcock*, the managing partner of the plaintiffs' firm, to supply him with *Lightmoor* pig iron on the usual credit, and told him that if the company would supply him, he would pay ten shillings beyond the price to be charged by the company on every ton of iron supplied to him, which

1825.

PIDCOCK v. BISHOP.

ten shillings should go in liquidation of his (*J. Pidcock's*) old separate debt. The latter replied that he must consult his partners upon the subject, but expressed his doubts whether they would consent to supply him with any more iron without the guaranty of some responsible person. In the result, it was agreed between *J. Pidcock* and *Tickell*, that the latter should be supplied with the iron he wanted, he undertaking to pay ten shillings over and above the market price upon every ton supplied, which ten shillings per ton extra was to go in reduction of *J. Pidcock's* separate debt; and that for this purpose he was to procure a responsible guarantee for the goods supplied. Accordingly *Tickell* applied to the defendant, who gave the guaranty in question, but the latter was kept in total ignorance of the private agreement above mentioned. In the bill of parcels accompanying the goods, there was a separate and distinct item for *J. Pidcock's* old debt, surcharged upon the amount of the iron; viz. 20 tons pig iron, 82*l.* 10*s.* Debt, 10*l.* Total, 92*l.* 10*s.* Under these circumstances it was contended that the defendant was discharged, the agreement between *Tickell* and *J. Pidcock* being in effect a fraud upon him; but the learned Judge was of opinion that the defence set up was no answer to the action, and the plaintiffs had a verdict for 82*l.* 10*s.*, with liberty, however, to move to enter a nonsuit if the Court should think the action not maintainable. *Denman*, C. S., having obtained a rule nisi, in last *Easter* Term, for this purpose, on the authority of *Jackson* v. *Duchaire* (*a*),

N. R. Clarke (with whom was *Clarke*) now shewed cause. In order to defeat this action it must be made apparent that a fraud was intended, or could in fact have been practised upon the defendant. Now it is difficult to see how the private agreement between *J. Pidcock* and *Tickell* could have that effect. The defendant's risk and responsibility could not be increased thereby. At the

(*a*) 3 T. R. 551.

utmost, it was an arrangement by which *J. Pidcock* wished to enable *Tickell* to pay an old standing debt, in a manner most easy to himself. It is true that *Tickell* had been a bankrupt, but non constat that his private debt to *J. Pidcock* was thereby barred, for there was no proof that he had obtained his certificate. For any thing, therefore, that appeared to the contrary, it must be taken to have been a valid subsisting debt, for which *Tickell* was still liable, and for the payment of which it was competent for him to enter into this agreement. Had it been an old debt, extinguished by operation of law, and for which *Tickell* was not liable, the onus lay upon the defendant to make out that proposition. But no such fact was established, and therefore it must be taken to have been a valid subsisting debt, for which *Tickell* was liable. If so, then the agreement by which it was to be liquidated by instalments of ten shillings per ton, upon the iron supplied, was rather calculated to benefit the defendant than otherwise; for if it was competent to *J. Pidcock*, after the iron was supplied, to sue *Tickell* at once for the *whole* amount of the old standing debt, and take his effects in execution, his means of paying for the iron must be thereby diminished, and the defendant's risk increased; whereas, by the agreement to take the old debt by instalments, an opportunity was given to *Tickell* of turning himself round, and relieving himself from his embarrassments. It is not to be assumed that the agreement had the effect of rendering *Tickell* unable to pay for the iron. The presumption is that his previous difficulties had so involved him, as to throw the responsibility upon the defendant. No doubt can be entertained that the defendant was aware of *Tickell's* difficulties. Indeed, the fact of his requiring a guaranty was demonstration that his credit was impaired; and therefore he must be taken to have given the guaranty with his eyes open. If he neglected to apprize himself of *Tickell's* real situation, the plaintiffs are not to suffer for his laches. No fraud was intended, nor indeed could any be practised upon him by this agreement, for at

1825.
PIDCOCK
v.
BISHOP.

the utmost his liability would only extend to the amount of iron actually delivered to *Tickell*. It is not pretended that he would be liable for the instalments of the old debt; and therefore, supposing the plaintiffs could not make him responsible beyond the amount of credit given for the iron supplied, still there is no principle of law which will exempt him from liability to that extent. This case is mainly distinguishable from *Jackson* v. *Duchaire*, because in that there was an attempt to impose upon the guarantee by a secret agreement between the plaintiff and the defendant, whereby something was stipulated beyond the inducement which had actuated the guarantee to pay the money. A person named *Welch*, being desirous of assisting the defendant, who was about to take a house which the plaintiff had previously occupied, agreed to purchase of the plaintiff, for the defendant, at the price of 70*l*., the goods which had been left in the house. The inducement to *Welch* to advance the money was that the plaintiff would be content to take 70*l*. for the goods; but it appearing that by a secret agreement between the plaintiff and the defendant the latter was to pay 30*l*. more for the goods, the Court held that this was a fraud upon *Welch*, who had consented to advance the 70*l*. on the faith that that was the sole consideration. It was therefore held that the 30*l*. for which the action was brought, could not be recovered by the plaintiff. But there is nothing in that case to shew that the contract between the plaintiff and *Welch* was rendered void by the secret agreement. Here the defendant is at all events liable on his guaranty for the goods actually sold to *Tickell*.

Denman (with whom was *F. Pollock*,) in support of the rule. On the general principle, that a guarantee for the debt of another is not liable, unless he is made acquainted with all the terms of the contract between the debtor and creditor, this action is not maintainable. Here the defendant was studiously kept in ignorance of a fact most material to his interests; for it is more than probable if he had been

apprized of this private agreement, he would never have given his guaranty. The case of *Jackson* v. *Duchaire* is not distinguishable from this in principle. [Here the Court stopped him.]

ABBOTT, C. J.—I am of opinion that this rule must be made absolute. I think that in every transaction like the present, a condition is virtually incorporated, that the party who is required to give a guaranty shall be truly informed of the bargain really made by the vendor of the goods with the buyer. Now, if it be part of the bargain that any thing extra shall be invoiced with or tacked to the market price of the goods, which is not communicated to the guarantee, I think the withholding of that circumstance discharges the guarantee. In this case the bargain was that the purchaser should pay beyond the market price of the goods supplied to him ten shillings per ton, which was to be applied in payment of an old debt due to one of the plaintiffs. This was an agreement which it was of the utmost importance should be communicated to the defendant, as respected the degree of his responsibility; for the effect of it was to enable the vendor to appropriate to the payment of the old debt, part of those funds which the defendant might reasonably suppose would go towards the payment of those goods for which he became guarantee, and consequently his risk became increased. It is more than probable that if the defendant had been informed by *Tickell* that the plaintiffs would not trust him unless he agreed to pay part of his old debt, by way of advance upon the market price of the goods, he would have said "No; I will have nothing to do with you. If you are dealing as a free man, you may probably be able to pay the debt which you are now incurring; but if you are not dealing as a free man, but are to be incumbered, and bound, and fettered in your dealings with the plaintiff, by an agreement by which you are to make payment of some other debt previously due, I cannot become your surety, for most likely I shall be deceived." It appears

1825.

PIDCOCK v. BISHOP.

to me, that keeping back from the defendant the knowledge of the private agreement between the vendor and vendee was a fraud on the guarantee, and consequently this action is not maintainable.

BAYLEY, J.—I am of the same opinion. There is no doubt it is the duty of a creditor taking a guaranty for the solvency of another, to put the surety in possession of the real bargain between him and the principal; and if he neglects so to do, it is at his own peril. There appears here to have been a debt due from *Tickell* to *J. Pidcock*. Whether that was a debt for which the latter could have maintained an action does not distinctly appear; but I should rather infer from what took place between the parties, that that was probably not the case, but that it was in fact a debt which *J. Pidcock* had proved under *Tickell's* commission. If that was so, then it was not a debt for which he could have maintained an action. Then what is the agreement between the parties? It is in substance this: *J. Pidcock* says to *Tickell*, "I will from time to time supply you with iron, not at the common market price of iron, but at the common market price, plus 10*s*. per ton, in respect of an old debt due from you to me, so that instead of having to pay me 80*l*. for the goods supplied, you will have to pay me 80*l*. 10*s*." Now if the plaintiff had apprized the defendant that this was the bargain subsisting between one of their firm and *Tickell*, he would have known, that the latter would not have the same means of paying for the goods as he would otherwise have had. He might have been induced to give his guaranty under the expectation that *Tickell* would be able out of the profits of his business to pay for the iron; but if he knew at the time he gave the guaranty that there was to be some other responsibility attached to the price of the goods, he would have hesitated or declined entering into the guaranty altogether. I am of opinion, that the concealment of that circumstance from the knowledge of the defendant was a fraud upon him and releases his liabi-

lity. It has been frequently held, in the case of a composition deed, whereby creditors agree to accept of their debtor a certain sum of money in full discharge of their respective debts, that a secret agreement by which the debtor stipulates with one of the creditors to pay him a larger sum, is absolutely void; and this upon the ground that it is a fraud upon the body of creditors at large. I am of opinion, upon the same principle, that the secret understanding between *J. Pidcock* and *Tickell* with reference to the old debt, was a fraud upon the defendant, and makes the contract void.

HOLROYD, J.—I also agree in opinion that the contract in this case is not binding on the surety, on the ground that his risk was increased by reason of the private bargain, to divert a portion of the proceeds of the iron sold, to the payment of an old standing debt. Had such agreement been communicated to the defendant, it is probable he would not have given the guaranty. Withholding the fact therefore was a fraud upon him, because he ought to have been made acquainted with every circumstance which was calculated to affect his responsibility. In this point of view, the secret agreement materially increased his risk, because it had a direct tendency to diminish *Tickell's* means of paying for the goods, for which he became surety collaterally. I think the defendant's liability is discharged.

LITTLEDALE, J.—I take it to be a general rule and principle of law that a surety ought to be made acquainted with the whole contract entered into with his principal. Probably the defendant looked to the proceeds of the iron as the fund out of which the plaintiffs were to be paid, and in the expectation that *Tickell* would be enabled by his industry and skill to discharge the amount of the purchase money, he consented as an act of friendship to become his surety. But by the secret agreement in question, he is placed in a worse situation, and he is subjected to a risk which

1825.

Pidcock v. Bishop.

he never contemplated. It appears to me, therefore, that the concealment of so material a circumstance amounts to a fraud upon the surety and discharges his liability.

Rule absolute.

Hawkins v. Warre.

Saturday, January 29.

In replevin the issue being whether the plaintiff held certain closes, at a fixed rent specified in the avowry:—Held, that *unstamped* receipts tending to shew that the plaintiff had previously paid for the same premises the like rent so specified, were inadmissible to support the issue.

Where a witness deposed that the settled draft of a lease was the final agreement between the parties, for one of whom he acted as agent:—Held, that an unstamped memorandum, written afterwards by himself but not signed by anybody, was admissible in evidence as a mere proposal, to shew that the settled draft was not the final agreement between the parties.

THIS was an action of replevin for growing corn taken as a distress for rent, in the parishes of *Kingston* and *Broomfield*, in the county of *Somerset*, in certain closes called *Voli's Yards*, &c. Avowry, that the distress was taken for £337 : 10*s*. for three quarters of a year's rent, due 25th *March*, 1823, upon a demise of the closes in question to the plaintiff at 450*l*. per annum, payable quarterly. There were other avowries claiming rent at the rate of 432*l*., 430*l*., and 412*l*. per annum respectively. Plea, that plaintiff did not hold or enjoy the said closes in which, &c. with the appurtenants, as tenant thereof to the said defendant, by virtue of the said supposed demise, at, and under the said rent, payable as in the said avowries mentioned, and issue thereon. At the trial before *Bosanquet*, Serj. at the last *Lent* assizes, for the county of *Somerset*, in support of the avowries, it appeared in evidence, that the plaintiff had held the closes in question under Mr. *Warre*, the defendant's father, by a lease for the term of seven years, expiring at *Lady-day*, 1815, at the rent of 360*l*. per annum. After this lease had expired, the plaintiff continued in possession of the premises until the year, 1818, when a negotiation was entered into with Mr. *Warre* for a fresh lease. Mr. *Charter*, steward to Mr. *Warre*, prepared a draft of the intended lease, which being sent to Mr. *Warre*, he made several alterations in it, and filled up blanks left

1825. Hawkins v. Warre.

for the names of other lands, which the plaintiff had taken possession of, and which were intended to be included in the fresh demise. A meeting afterwards took place between the parties, when some further alterations were made in the draft, and it was finally agreed (as stated by Mr. *Charter*) that the draft as then settled should be engrossed and the lease executed. It was accordingly engrossed, and executed by Mr. *Warre*, and then sent by Mr. *Charter* to the plaintiff with a bill of costs and charges for preparing the lease. This bill was afterwards paid by the plaintiff, but he never in fact executed the lease. By this lease the whole rent reserved was 450*l.*, but there was a proviso to deduct 20*l.* per annum, if the market price of wheat should be under 10*s.* a bushel. There was also a proviso for abating an aliquot portion of the rent for one of the closes called *Higher Volis*, in case the term therein should cease by the death of Mr. *Warre*, who had only a life estate therein with remainder to Mrs. *Warre*. Mr. *Warre* having died some short time after the lease was granted, it was agreed between the plaintiff, Mrs. *Warre*, and Miss *Warre*, her daughter, (the defendant,) that 18*l.* per annum should be paid to Mrs. *Warre* for the close called *Higher Volis*. The avowries were respectively framed according to the provisions of the lease for the deductions of rent above-mentioned. In order to shew that the plaintiff had acquiesced in the terms of the lease, although he had not executed it, the defendant produced certain unstampt memoranda, purporting to be receipts for rent paid under the terms contained in the lease. These memoranda were copies of papers set forth by the plaintiff himself in a schedule to his answer to a bill filed against him in chancery to compel a specific performance, which copies had been furnished by the plaintiff himself to the defendant, pursuant to an order of the Lord Chancellor for that purpose. These memoranda being tendered in evidence, they were rejected by the learned judge, on the ground that, as

1825.
HAWKINS v. WARRE.

receipts, they were not admissible for want of a stamp. The first was in these terms:

Hestercombe, October 28th, 1821

Mr. *Hawkins*,

Dr. to Miss *Warre*,

For half a year's rent due last *Michaelmas*.

	£	s.	d.
Oct. 12th	30	0	0
Oct. 28th	70	0	0
Feb. 23d	91	14	0
Disbursements	4	6	0
According to the price of wheat	20	0	0
	216	0	0

Received the above, *E. M. T. Warre*.

For the purpose of contradicting the statement of Mr. *Charter*, that the draft of the lease contained the final agreement between the parties, and in order to shew that the plaintiff was to pay a different rent from that supposed to be then agreed upon, the plaintiff's counsel put in an unstampt paper, in Mr. *Charter's* handwriting, dated subsequently to the time when the draft was settled. The paper was to this effect:

				£	s.	d.
"Old Rent . . .				360	0	0
Abatement				36	0	0
				324	0	0
To 27 acres	67	10	0			
To 16 acres of Broadmead ·	40	0	0			
To B.	26	0	0			
				133	10	0
				457	10	0

450*l*. a year, from *Michaelmas*, 1818, for a term of seven years: Mr. *Warre* undertaking wheat shall be at 10*s*. a bushel, and barley 5*s*. upon the terms of the old lease."

boay,
missil
agree

This paper not being signed either by Mr. *Warre* or the

defendant, nor appearing to have been authorized or adopted by either, it was objected to by the defendant's counsel as inadmissible in evidence, on that ground, as well as on the ground of its being unstampt. The learned serjeant, however, received it in evidence, and upon the whole case left the jury to say whether the farm had or had not been let to the plaintiff on the terms mentioned in the lease. The jury found their verdict for the plaintiff for 4*l.* 4*s.* the amount of the expenses of the replevin bond.

Pell, Serj. in *Easter* term last, obtained a rule to shew cause why the verdict should not be set aside and a nonsuit entered, or why there should not be a new trial granted, on two grounds, first, that the papers purporting to be receipts, and tendered by the defendant to shew that the plaintiff had acquiesced in the lease, had been improperly rejected; and second, that the memorandum produced by the plaintiff had been improperly received for want of a stamp.

Wilde, Serj. and *R. Bayly* now shewed cause against the rule. The admissibility of the receipts which were produced on the part of the defendant depends upon the purpose for which they were produced. At the trial, the question was, whether the plaintiff held the farm at the rent stated in any of the avowries. The lease which had been prepared was no evidence upon this issue, inasmuch as it had never been executed by the plaintiff. The defendant was, therefore, driven to some other evidence, in order to shew on what terms the plaintiff had attorned tenant. For this purpose the receipts were offered as evidence of the payment of the fixed rent mentioned in the avowries. It is clear that unless they amounted to evidence of the payment of such rent, they would have availed the defendant nothing, and the avowries must have failed. Then as they were offered as direct evidence of the payment of rent, it is clear they were inadmissible for want of

1825.
HAWKINS
v.
WARRE.

stamps. Had they been offered for a collateral purpose, e. g. to refresh the memory of a witness, they might have been received; *Jacob* v. *Lindsay* (a); but it is obvious they could not be received per se, as direct evidence of the payment of the amount of rent stated. They were therefore properly rejected. Then the memorandum in Mr. *Charter's* handwriting was admissible for the very reason that the receipts ought to have been rejected. It was not put in as evidence of the contract between the parties; but for a collateral purpose. Mr. *Charter* having stated that the settled draft of the lease was the final agreement between the parties, this memorandum in his own handwriting was put into his hand, if not for the purpose of contradicting him, at least of refreshing his memory and shewing that he was mistaken. It was produced as a contemporaneous memorandum, shewing that the lease was not in fact the final agreement between the parties. For this purpose it was legitimate evidence, and as it was offered with no other view, it was properly admitted. Had it been produced as evidence of the actual agreement between the plaintiff and Mr. *Warre* undoubtedly it would have required a stamp, but being tendered for a collateral purpose, the objection to the want of a stamp could not arise.

Pell, Serj., *Adam, C. F. Williams* and *Manning*, contrà. The unstampt receipts produced at the trial were not offered as direct evidence of the contract under which the plaintiff held the farm, but as collateral proof of the amount of rent which the plaintiff had theretofore paid his landlord. For that purpose they were certainly legitimate, though not conclusive evidence. There are several cases which establish that, for a collateral purpose, an unstampt instrument is receivable in evidence; *Rex* v. *Hawkeswood* (b), *Rex* v. *Pooley* (c), *Holland* v. *Duffin* (d), *Dover* v. *Mastaer* (e). [*Abbott*, C. J. The difficulty I have, is in saying that

(a) 1 East, 460. (b) 2 East, P. C. 955. (c) 3 B. & P. 316.
(d) Peake's N. P. C. 58. (e) 5 Esp. N. P. C. 92.

1825.

Hawkins v. Warre.

these receipts were offered in evidence for a purpose purely collateral. Were they not produced expressly for the purpose of establishing the fact stated in the avowry, that the plaintiff held the farm at a certain rent? Were they not offered to shew that a certain rent had formerly been demanded of the plaintiff, and submitted to by him? If so, then they were not offered for a collateral, but a direct purpose, in order to establish the affirmative of the issue raised on the pleadings.—*Bayley*, J. In the cases cited, the unstampt instruments were received alio intuitu. For instance, in *Rex* v. *Hawkeswood*, which was an indictment for forgery, although the unstampt instrument could not be available for any other purpose, yet it was admissible, in order that the party indicted might not exempt himself from the punishment attending the crime of forgery.] Admitting that they could not be used so as to operate as a discharge to the plaintiff for byegone rent, still they may be used for the purpose of creating a further charge against him. At all events, the unstampt memorandum in Mr. *Charter's* handwriting was inadmissible for want of a stamp. The object of it was, to shew what the real agreement between the parties was. Mr. *Charter* having stated that the settled draft of the lease was the final agreement, this memorandum was produced to contradict him, and shew that the agreement was not such as he had sworn to. The object of it was, therefore, to set up another and a different agreement, which should be an answer to the avowries, and consequently it could not be admitted without an agreement stamp.

Abbott, C. J.—I am of opinion, that the rule nisi obtained in this case, must be discharged. This is an action of replevin, in which the plaintiff complains that the defendant took his growing corn in certain closes and unjustly detained the same. The defendant avows the taking of the corn as a distress for three quarters' rent, in respect of premises which the plaintiff held under the defendant as her tenant, by virtue of a demise at a certain fixed rent. The

1825.
HAWKINS v. WARRE.

plaintiff, in his plea to the avowry, denies that he held or enjoyed the said closes in which, &c. with the appurtenances, as tenant thereof to the said defendant, by virtue of the said supposed demise, at, and under the said rent, payable as in the said avowry mentioned, and issue is taken upon this fact. Now as a certain fixed amount of rent is alleged to be due in the defendant's conusances, it was incumbent on her to establish that the plaintiff held the closes at a rent corresponding exactly with the sums therein mentioned. Unless she made out that fact, the plaintiff would be entitled to a verdict. The burden of proof in that respect lay on the defendant, for unless she could prove that the premises were demised at a certain fixed rent, no distress could be taken. If there had been any doubt upon the fact, there was another remedy open to her, namely, by an action for use and occupation, which would have entitled her to recover the annual value of the land during the time it was occupied; but having by her avowries undertaken to aver that the land was demised at a certain fixed rent, the burden lay upon her to prove that fact. The first mode in which the defendant attempted to prove the fact was, by shewing that the plaintiff had in former years paid rent agreeing with the amount stated in some of the avowries, and if she had established that fact by legitimate evidence, though I do not say it would have been conclusive, yet it would have been a strong case in her favour, requiring a cogent answer on the part of the plaintiff. For this purpose the defendant tendered in evidence certain unstampt papers, from which it would appear that the plaintiff had, in former years, paid rent corresponding with the amount of rent stated in some of the avowries. These papers my brother *Bosanquet* refused to receive, on the ground that they were not stamped. Now these papers could have had no force or effect for the purpose of advancing the defendant's case, unless they amounted in law to receipts for rent; for if they were not receipts they were of no validity. But taking away from them the effect of shewing as a fact that rent

had been formerly paid, corresponding in amount with what was stated in the avowries, still they would come to nothing more than evidence of a claim having been made by the defendant upon the plaintiff. In whatever way they may be considered, or for whatever purpose they may have been offered, I think they were inadmissible to support the issue. By the stamp act, 31 *Geo.* 3. c. 25. s. 16. which is incorporated in the 55 *Geo.* 3. c. 184. "No receipt, discharge, or acquittance, note, memorandum, or writing, shall be pleaded or given in evidence in any court, or admitted in any court to be useful, or available in law or equity, as an acknowledgment of any debt, claim, accounts, or demands being paid, settled, &c. unless the same shall be stamped." It is said, however, that although such unstamped instruments as these cannot be used, so as to operate as a discharge of the tenant, they may be admitted as evidence to create a further charge against him. I think that would be too narrow a construction of the statute, for it seems to me that such instruments must be understood to be useless and invalid, not merely for the purpose of discharging the party therein named, but also for the purpose of charging him with some ulterior sum, by reference to what he may have on some former occasion paid. If the plaintiff could not make these receipts available for his own discharge, I think the defendant cannot make them available so as to make him liable for a subsequent demand. I am therefore of opinion that these receipts were properly rejected. The second mode of proof to which the defendant resorted, in order to shew that the plaintiff held the premises under her at a fixed rent, was by shewing that he had consented to hold the estate according to the terms specified in a lease executed by the defendant's father but not by the plaintiff. Mr. *Charter* was called to prove this, and in giving his evidence he was desirous of fortifying his memory by reference to something in writing, and he stated that the settled draft of the lease was the final agreement between the parties. Taking that gentleman's testimony, unexplained, it certainly

1825. HAWKINS v. WARRE.

would appear that the plaintiff had acceded to the terms of the lease, and consented to hold the premises at the rent therein stipulated. Then for the purpose of shewing that he was mistaken in his apprehension of the fact, and that the plaintiff had assented to no such terms, another paper is put into his hands, which he admits to be his handwriting. The plaintiff being desirous of having that paper read, it was objected that it could not be read for want of a stamp. If that paper contained an agreement, I admit it could not be read unless it was stamped, but I am of opinion that it did not contain an agreement, and could not be so considered. Properly its only effect is to shew that a proposal had been made by Mr. *Charter* himself in his own handwriting, not corresponding with the terms contained in the lease. I think it was receivable in evidence as a proposal only, though not as a contract. It cannot be treated as a contract, because it is not signed by anybody. It seems to me that this case is not distinguishable from *Ramsbottom* v. *Tunbridge* (a). There a written paper delivered by an auctioneer to a bidder, to whom lands were let by auction, containing the description of the lands, the term for which they were let to the bidder, and the rent payable, but not signed by the auctioneer or any of the parties, was held not to be such a minute of the agreement as was required to be stamped. So I say here this paper is no minute of an agreement. It is no more than if Mr. *Charter*, being pressed to state all that passed between him and the plaintiff, had said, "I did propose by word of mouth that he should hold the premises, according to the terms written on this piece of paper." In this point of view I think the paper was receivable in evidence as a mere proposal, and consequently it did not require a stamp. It being a question for the jury whether the plaintiff consented to hold according to the terms of the lease, I think it was very fit and proper that all the proposals relating to that question should have been received in evidence. Although I cannot say I am

(a) 2 M. & S. 434. See [illegible] v. *Morley*, id. 11[illegible]

dissatisfied with the verdict which the jury have found, yet I should have been equally satisfied had they found the other way.

BAYLEY, J.—I entirely concur in opinion with my Lord Chief Justice, and I entertain no doubt upon either of the points raised in argument. The case of *Doe* v. *Cartwright* (*a*) is an additional authority to shew that the memorandum produced to contradict Mr. *Charter* could only be considered as a proposal and not an agreement, and consequently did not require a stamp.

HOLROYD, J. was of the same opinion.

LITTLEDALE, J. was gone to chambers.

Rule discharged.

(*a*) 3 B. & A. 326.

The KING v. JOSIAH TAYLOR (*a*).

Tuesday, February 1

If a continuance be entered from the last day of *Trinity* to the first day of *Michaelmas* term, facts occurring in the interim cannot be pleaded puis darrein continuance after the first day of *Michaelmas* term, without the leave of the court.

INDICTMENT for a nuisance in keeping a common gaming-house. Plea, auterfois acquit. This plea was pleaded in *Trinity* term last, and at the *Westminster* sessions between *Trinity* and *Michaelmas* terms, the defendant was tried and acquitted on another indictment for the same offence. In *Michaelmas* term, before the prosecutor had replied to the former plea, the defendant pleaded his last acquittal puis darrein continuance. This plea was in fact put in on the 19th of *November*, but it was entitled of the term generally.

Chitty, in the course of the last term, having obtained a rule nisi for taking this plea off the file, upon an affidavit suggesting that the last acquittal had been procured by bribery, fraud and collusion,

(*a*) S. C. ante, 422.

1825.

The KING v. TAYLOR.

Brodrick, on a former day in this term, shewed cause. This is an attempt to burthen the defendant with all the costs of the proceedings, but it cannot succeed; for the court have no such summary jurisdiction as this application attributes to them. The defendant is not an officer of the court, therefore there is no reason for their summary interposition; and there are cases shewing that the court have no discretion on this point, but are bound to receive pleas puis darrein continuance. *Paris* v. *Salkeld* (a), and *Lovell* v. *Eastaff* (b). [*Bayley*, J. There was a special reason for the decision of the court, in the latter case, namely, that a rule for a new trial was pending at the time the application was made. Besides, the title of this plea is irregular.] Undoubtedly the plea was pleaded on the 19th of *November*, and it is entitled of the term generally. Even if that be irregular, it is not such an irregularity as will warrant the summary interposition of the court. Suppose an untrue assertion had by accident found its way into the body of the plea, the court would not on that account take the plea off the file; they would leave the prosecutor to his common remedy, a replication, or a demurrer. It is not pretended that this plea is bad in substance, and it would be a new step to take it off the file for a mere informality in the title, which it is the constant practice of the court to allow the party to amend. But, under all the circumstances of the case, it seems that this plea is strictly regular and unobjectionable, for when issue has not been joined, facts puis darrein continuance may be pleaded of the term generally, and are not confined to the particular day up to which the continuance is entered. Lord Chief Baron *Comyns* says, "If any thing happens pending the writ, and *before issue joined*, which goes in bar, or proves the writ abated, and not abateable only, it may be pleaded, without saying after the last continuance;" and he cites 2 *Lutw.* 1178, as an authority in point (c). Now the same rule would equally apply to the interval in the pro-

(a) 2 Wils. 137.   (b) 3 T. R. 554.

(c) Com. Dig. tit. *Abatement*. (I. 24.)

ceedings after plea and before replication, and the present case comes clearly within the principle laid down. [*Littledale*, J. In the same work, under the same head, you will find another case cited, from 2 *Jones*, 129, where the court received a plea puis darrein continuance at the end of a week after the commencement of the term.] If the court interfere at all, it can be only to order the defendant to amend his plea by entitling it on the same day on which it was filed; and even that they will not do upon the present motion; it must be the subject of a separate application.

Chitty, contrà. The only question is, whether this plea is irregular, for if it is, the court may strike it off the file; and under the circumstances of this case, they will do so, if they can. The first plea put upon the record was a special plea, and the rules of practice do not allow a defendant to waive a special plea, and plead de novo, without the special leave of the court. *Tidd*, 725, et seq., 8th ed.; 1 *Archbold*, 123, 1st ed. and the cases there collected. The defendant has not even now ventured to swear that the last acquittal was obtained fairly and bonâ fide, therefore he certainly does not stand in a situation to ask for any indulgence from the court. The cases cited on the other side do not govern the present. Undoubtedly, where a plea puis darrein continuance is pleaded in proper time, the court have no discretionary power to receive or reject it; but the present is clearly pleaded out of time, and pleas of this nature, if they are pleaded too late, may be set aside like pleas in abatement, in respect of which the court have frequently interfered in the manner now prayed for. *Willoughby* v. *Wilkins* (a), *Tidd*, 902, 8th ed.; 1 *Archbold*, 123, 1st ed.

The Court took time to consider of their judgment, which was now delivered by

Abbott, C. J.—This case came before the court upon a motion to set aside a plea puis darrein continuance. The

(a) 2 Smith, 396.

1825.
The King v. Taylor.

indictment was for keeping a common gaming-house. The plea stated, that after the indictment was preferred in this court, another indictment had been preferred at the quarter-sessions for the same offence, upon which indictment being brought on for trial, the defendant was acquitted. This plea was pleaded generally as if it referred to the first day of the term. It is clear now, by the affidavit, that it was not put upon the file of this court until the 19th *November*. The prosecutor, by his counsel, therefore moved to take that plea off the file, contending that a plea puis darrein continuance must be pleaded on that day to which the continuance is made; that is, that in this case it could be pleaded on the first day of *Michaelmas* term only. This is the case of a criminal proceeding. In civil actions, by the indulgence of the court, four days are allowed; but even if that indulgence was extended to cases of indictments, it would not extend to a case where the plea was not pleaded until long after the first four days of the term. If we consider how the record would have been drawn up in ancient times, and how it should be drawn up in modern times, we shall find that it would state the continuance to be upon the appearance of the attornies for the prosecution and for the defendant, and that would be recorded on the first day of the term, an undertaking being given for the appearance either on the last day of the term, or some other day. Supposing this entry to have been made, it is quite clear that this plea, coming in after that day, and referring to a matter which took place in vacation, would, on the very face of it, appear to be a bad plea. Now it was said, inasmuch as there was no such entry on this record, this party might come in and put his plea on the file at a later time. It is obvious that he might have done so on the first day of the term; but why wait during almost the whole of that term, if he professed to enter the continuance from the very last day of the preceding term to the first day of the ensuing term? In the case cited by Lord Chief Baron *Comyns*, from 2 *Jones*, the party was admitted to plead after the first day of the term, which cer-

tainly imports that it was not done without the permission of the court. No doubt for the furtherance of justice, more especially in a criminal case, if the party by any inadvertence has let slip his time and neglected to plead, the court would give him leave to do so. In the case of *Lovell* v. *Eastaff*, which was cited on the part of the defendant, we see that even though the defendant did not put in his plea until a later day, still, on a motion to take that plea off the file, the court thought it right to look to the circumstances of the case, in order to see whether justice required that it should be taken off. In that case the court refused to take the plea off the file; but what was the reason assigned? That on the first day of the term, and for several days afterwards, a motion was pending in this court for a new trial, and therefore, until that motion was disposed of, it would have been useless to put on the file that plea which was put on the file immediately after the motion for a new trial was disposed of. The plea was a plea of bankruptcy, and it would have been quite useless to put it on the file earlier. Upon the present occasion the plea was pleaded without any previous application to the court. The rule which was obtained to set aside the plea is founded upon an affidavit stating positively, that the acquittal which forms the subject of the plea had been obtained by fraud and collusion, and that is not denied by the defendant. He has been advised, and no doubt he has been well advised, not to pledge his conscience in contradiction to that which is here alleged. That fact remaining uncontradicted, the question is, whether a plea irregularly pleaded should be suffered to remain on the file of the court, when its effect would be, according to an uncontradicted affidavit, to defeat the ends of justice, and to prevent the trial of the defendant by means of an acquittal, obtained in all probability by his own money. For these reasons I do not think the rule ought to be discharged.

Rule absolute.

1825.

Tuesday, February 1.

The lord may grant, by deed, the stewardship of a manor, for the life of the grantee.

Where an alleged outstanding term appears to have done the duty for which it was created, the jury are at liberty to presume a surrender of it.

BARTLETT *v.* DOWNES.

ASSUMPSIT for money had and received by defendant to plaintiff's use. Plea, non assumpsit, and issue thereon. At the trial before *Abbott*, C. J. at the adjourned *Middlesex* sittings after last *Michaelmas* term, the facts of the case appeared to be these. The plaintiff claimed to be steward of the manor of *Danbury*, in the county of *Essex*, and brought this action to recover the amount of certain fees received by the defendant while acting in that character. The plaintiff grounded his claim to the office on a deed dated in 1821, and executed by *Rose Ray*, who was then seised in fee of the manor, and by which she gave and granted unto the plaintiff the office of steward of the said manor of *Danbury*, and the holding and keeping of all courts of what kind soever to the said manor belonging or appertaining, and the doing all other acts relating thereto; and did thereby make, constitute, and appoint the said plaintiff steward of the said manor, and of the courts to the same belonging, to have, hold, exercise and enjoy the office aforesaid, and the holding and keeping of the said courts, and the doing all other acts as aforesaid, and the receiving the fees and profits to the said office belonging, from thenceforth during the term of his natural life. *Rose Ray* died the 20th of *October*, 1821, having previously devised the manor of *Danbury* in fee to *Charles Downes*, and *Charles Downes*, contending that the plaintiff had no right any longer to continue steward, authorized the defendant, *Edward Downes*, to act as steward, in consequence of which the latter held a court, and received certain fees, for the recovery of which the action was brought. It was objected, on the part of the defendant, that *Rose Ray* had no power by law to create a freehold office, and, consequently, that the grant of this office by her to the plaintiff was absolutely void; but the Lord Chief Justice overruled the objection, giving, however, the defendant leave

to move to enter a nonsuit. The defence then set up was a term, alleged to have been outstanding at the time when *Rose Ray* granted the office to the plaintiff. This term, which was for 500 years, was created in 1712; and was assigned in 1785, as being then satisfied, to attend the inheritance. When *Robert Ray*, the husband of *Rose Ray*, purchased the manor, namely in 1793, a general declaration was made in the deed of conveyance, that all persons who had terms in them should hold them in trust to attend the inheritance; but no specific term was mentioned. When the plaintiff's title was first called in question, *Charles Downes* wrote a letter in which he admitted that *Rose Ray* had power to grant the office, but denied that in point of fact she had done so. The Lord Chief Justice, upon this evidence, left it to the jury to say whether they thought there was or was not any outstanding term, and they being of opinion that there was not, found their verdict, under his lordship's direction, for the plaintiff, for the full amount of all the fees received by the defendant.

Scarlett, on a former day, moved for a rule nisi in the alternative, either to enter a nonsuit, or for a new trial. First, the grant of this office by Mrs. *Ray* to the plaintiff was absolutely void, for a private individual cannot create a freehold office; that power is vested in the crown alone. Mrs. *Ray*, therefore, had no right to appoint a steward for life, and thereby to bind her successors and infringe upon their privileges. In the Earl of *Shrewsbury's* case (*a*), a steward of a manor was appointed for life, but that was a grant by the crown; and in *Owen* v. *Saunders*(*b*), a clerk of the peace was appointed for life, but that was a grant by act of parliament. Every lord of a manor is entitled to appoint his own steward, but if he dies, or aliens the manor, his appointment is at an end; for the steward is his servant, and he has no right to appoint a servant for his successor; therefore the plaintiff's appointment ceased from the moment

(*a*) 9 Rep. 42. (*b*) 1 Ld. Raym. 158.

1825.

BARTLETT v. DOWNES.

when Mrs. *Ray* died. Second, the learned judge should not have left it to the jury to say whether there was, or was not, an outstanding term. There was, perhaps, evidence from which it might be inferred that the object of the term had been satisfied, but there was certainly no evidence from which to infer that it had merged or been surrendered. The evidence led rather to the opposite conclusion. In 1785 the term was expressly assigned to attend the inheritance, and, in 1793, when the manor came into the possession of Mr. *Ray*, a declaration was made in the deed of conveyance, that all outstanding terms should be held in trust to attend the inheritance; and that must be presumed to have applied to the term created in 1712, because there was no evidence of the creation of any other term than that. In that case, the term of 1712 must have been in existence so lately as 1793, and as there was no proof from which to infer the subsequent surrender of it, the jury should have been directed to find that it was still outstanding.

The Court took time to consider of their judgment, which was now delivered by

ABBOTT, C. J.—We are of opinion that we ought not to grant any rule in this case. There were two grounds upon which the rule was moved for. The first point was, whether the appointment of the steward of a manor court, beyond the life of the granter, could be a good grant. It was admitted that such a grant by the crown might be good, but it was contended that such a grant by a subject could not be good, except by the aid of custom or an act of parliament. It was said that a subject cannot create an office for life; that is true: but we think the stewardship of a manor is not an office created, but that it is merely a designatio personæ, by which the person to whom the appointment is made may be known. In *Littleton*, sect. 378, where he is writing on the subject of estates which are held upon conditions in law, he mentions a case of a grant by

1825.

BARTLETT v. DOWNES.

deed of the office of keeper of a park. "If a man grant by his deed to another the office of parkership of a park, to have and occupy the same office *for term of his life*, the estate which he hath in the office is upon condition in law, to wit, that the parker shall well and lawfully keep the park, and shall do that which to such office belongeth to do, or otherwise it shall be lawful to the grantor and his heirs to oust him." This is to shew that a grant of an office of that kind is subject to a condition in law, namely, that the party shall discharge the duty of his office, and that upon the violation of such duty there would be a forfeiture of the office; and that is said in respect of a grant by a subject. Then Lord *Coke*, when he comes to comment on that section, 1 Inst. 233 b. introduces, among other offices, the very particular office now in question. He mentions the case of a stewardship of a court of a manor. He says, "where an officer hath no other profit but a certain collateral fee, the grantor may discharge him of his service, the discharge whereof is but labour and charge to him, but he must have his fee;" and in the same page he proceeds, "If a man doth grant to another the office of the stewardship of his courts of his manors, with a certain fee, the grantor cannot discharge him of his service and attendance, because he hath *other* profits and fees belonging to his office which he should lose if he were discharged of his office." Now that is saying, where there is any office granted with a certain fee, and no emolument belonging to the office except that certain fee, that the grantor may discharge the party from the duties of his office, which is only burthensome; but where there is a stipulation made that the party shall have other fees, those appertaining to the office, there Lord *Coke* says that the grantor cannot discharge, because the grantee is to have other profits belonging to the office, which he would lose if he was discharged. Now this is very good authority, or these are instances at least, to say no more of them, to shew that a grant for life of an office of the description now under discussion, is a good and valid grant. If the grantor him-

1825.

BARTLETT v. DOWNES.

self cannot discharge the grantee, how can any other person? On what principle shall it be said that a person claiming under the grantor shall be in a different situation from him? I am at a loss to see upon what principle that can be done. In *Harvey* v. *Newlyn* (a) the Court seem to have come to their decision against the plaintiff, because it was not alleged by him that there was any profit belonging to the office; and if so, he suffered no injury from being discharged; he was only relieved from certain trouble. The Court say distinctly, if profit belonged to the office, and it had been so alleged in the declaration, the grant of the office for life would have been good. That point, therefore, seems to be set at rest upon this authority. Then the next point Mr. *Scarlett* made was, that I ought not to have left it to the jury to presume any surrender or merging of the outstanding term. I think I did not direct them as to their finding—I merely left it to them to consider whether they would or would not presume a surrender, having first endeavoured to explain to them the nature of the subject. If I ought not to have left it to the jury to consider if such a presumption might not be made from the circumstances which appeared on the trial, then I was wrong, and there ought to be a new trial. The plaintiff proved the grant as having been made by this lady just before the execution of her will. The defendant on this evidence was clearly a wrong-doer, and he shewed no title. But we will take it that he was the person which the statement of his learned counsel represented him to be, namely, the brother of the gentleman to whom the lady devised the estate; and that the devisee had thought fit to appoint him steward of the manor, and to rescind the appointment of the testatrix. It appeared that there had been a term originally created for a future purpose, and that such purpose was satisfied. Then, in 1785, there was a sale of the estate, and that term was then outstanding in a trustee for the benefit of the inheritance. In 1793 there was another sale of the estate to the husband of the testatrix, and in one of the conveyances there was a

(a) Cro. Eliz. 859.

general declaration that all outstanding terms should be for the benefit of the purchaser, but the particular term was not mentioned. Now, if the outstanding term which the defendant set up could prevail, it would prevail to defeat the act of the testatrix in making the grant she made. The general principle upon which a presumption should be allowed I think is this, that that which has been done should be presumed to be rightly done. That I take to be the general principle, and if we apply that to many cases of right, it must be taken to be so. Applying it to the question of a right of way—if we find the act has been often repeated, (for the occasional use of a walk or path across a man's field would be hardly such a use as would establish the right,) but if the act must necessarily have been often repeated, with the knowledge of the person setting up an adverse right, it affords a strong presumption in favour of the right so exercised. The same principle is to be applied to presumptions in the case of light, or of water (*a*); in each of those cases there must be a long continuance of enjoyment to warrant the presumption. But upon a question of the surrender of a term the case is somewhat different; for with respect to conveyances, you cannot in the nature of things find repeated acts; it is not to be expected. And although that is so, the Courts have, in many instances, during a considerable length of time, decided, that juries are at liberty, where they find that such a term as this has been set up, and has done the duty for which it was originally created, to presume a surrender of it. In this case there was the letter of *Charles Downes*, admitting that Mrs. *Ray* had the right of appointment; from which it was to be inferred, as against him, that the term did not exist; I therefore thought the jury might be justified in presuming this outstanding term to have ceased. Here, the grant of the office, supposing such a term to be outstanding, would have been void at law, which, certainly, it was never meant to be. On the con-

1825.

BARTLETT v. DOWNES.

(*a*) See *Cross* v. *Lewis*, ante, vol. iv. 234, and *Williams* v. *Morland*, ante, id. 583, and the cases there cited.

1825. BARTLETT v. DOWNES.

trary, if you presume the term to have merged, the grant of the office would be good. In that view of it we are of opinion it might properly be left to the jury to presume a surrender of the term, to give validity and effect to the act of the testatrix in making the grant. For these reasons we are of opinion that the verdict found for the plaintiff ought not to be disturbed.

Rule refused.

Tuesday, February 1.

MONTAGUE *v.* BARON.

Where a tradesman clandestinely supplied a gentleman's wife with jewellery, unnecessary for her station in life, and there was no evidence either express or implied that the husband assented to the contract:—Held that he was not liable.

ASSUMPSIT for goods sold and delivered. Plea, non assumpsit, and issue thereon. At the trial before *Abbott*, C. J., at the adjourned *Middlesex* Sittings after last *Trinity* Term, the plaintiff's case was this:—The plaintiff was a jeweller, and the defendant a certificated special pleader in extensive practice. Towards the close of the year 1823, and in an interval of not more than eight weeks, the plaintiff sold to the wife of the defendant, and delivered at his dwelling-house, various articles of jewellery, amounting altogether to 83*l*., but of which he had received from her 34*l*. on account. The plaintiff never, throughout the transaction, saw any one but the wife of the defendant, and the goods were all delivered to her, usually about noon, when the defendant was from home. Upon this state of facts, it was contended that the plaintiff must be nonsuited, there being no evidence that the defendant knew of the delivery of the goods to his wife, and there being, therefore, no evidence of his consent to the contract, without which he could not be liable; and *Waithman* v. *Wakefield* (*a*), *Metcalfe* v. *Shaw* (*b*), and *Bentley* v. *Griffin* (*c*), were quoted as authorities in point. The Lord Chief Justice declined to nonsuit, being of opinion that there was sufficient evidence to go to the jury. The defendant then proved the following facts: The defendant was married to his wife towards the close of

(*a*) 1 Camp. 120. (*b*) 3 Id. 22. (*c*) 5 Taunt. 356.

the year 1817, and received with her a fortune somewhat less than 4000*l.*, in consideration of which, and by the terms of their marriage-settlement, he allowed her for her separate use 60*l.* a year. They resided in a ready-furnished house in *Guildford Street*, the rent of which was 200*l.* a year, and none of the furniture was either new or costly, and some of it very much the contrary; and they kept no man-servant. The defendant's wife, at the time of their marriage, had a supply of jewellery suitable to her station in life, and she had never worn any of the articles purchased of the plaintiff in the presence of her husband. The defendant carried on his profession in the *Temple*, and he constantly left his house at ten o'clock in the morning for his chambers, and returned at five in the afternoon. The plaintiff and his shopman frequently called at the defendant's house for payment, but they never saw the defendant, nor did they ever inquire for him, but they invariably inquired for his wife; and on one of those occasions, the shopman having told the woman servant who admitted him, that he called for payment of a bill of 80*l.*, for jewellery, the servant said, she wondered the plaintiff had trusted her mistress for so large a sum, for she was sure her master knew nothing of it; to which the shopman, as she swore, but in which he contradicted her, replied, "his master was quite aware of that." The Lord Chief Justice told the jury that a husband was not liable for goods furnished to his wife, unless she had his authority to purchase them, express or implied. That in order properly to decide the question of such an authority, it was important to consider the rank and station of the parties, and the nature and value of the goods. Necessary articles, such as provisions for the family, the wife must, by law, be presumed to have authority to purchase; but the articles in the present case were not necessary for the wife, and as it was in evidence that her husband had never seen them, it was a question for the jury to decide whether he had ever given his wife any authority, express or implied, to purchase them. The jury found a verdict for the plaintiff.

1825.
MONTAGUE v. BARON.

Gurney, in *Michaelmas* term last, obtained a rule nisi, either to enter a nonsuit upon the ground taken at nisi prius, or for a new trial upon the ground that the verdict was against evidence; and

Platt (with whom was *Copley*, A.G.) now shewed cause. The jury have found by their verdict that the articles in question were suitable for the wife of a man in the defendant's rank in life, and that they were supplied with his consent, impliedly, if not actually given. Those were questions of fact proper for the decision of the jury, and they having considered and decided them, their verdict cannot be disturbed. There was good evidence to warrant them in their first finding; because it was proved that the defendant kept up a very respectable establishment, and lived in a good style; and having done that, he is primâ facie liable to pay the debts which he, by those means, enabled his wife to incur. There was also sufficient evidence of his consent to her ordering the goods. Such a consent need not be proved actually; nor need the goods be actually ordered, delivered, or worn, in his presence: if they are suitable to his rank in life, and they are worn by his wife while they are cohabiting, the law will presume that he consented to the purchase of them. There was nothing in the case to shew that the plaintiff did, or had reason to suspect, that the goods were ordered clandestinely; and his application to the wife for payment could not alter the liability of the husband. In *Morton* v. *Withens* (a), where the wife had a separate allowance for clothes, and there was no evidence that she had occasion for the articles supplied by the plaintiff, it did not appear that the husband had seen or known of the most valuable part of the goods purchased by the wife; and therefore, in principle, that is an authority in favour of the plaintiff in this case. As the whole case was one for the decision of the jury, and was so left to them, there is at least

(a) Skinner, 348. See *Todd* v *Stoakes*, 1 Salk. 116.

no ground for entering a nonsuit; and even if a new trial were granted, it would not benefit the defendant, because another jury would probably arrive at the same conclusion as the former. This rule, therefore, must be discharged. 1825. MONTAGUE v. BARON.

Scarlett, (with whom were *Gurney* and *E. Lawes*) contrà. *Morton* v. *Withens* does not apply to the present case, because the defendant there filled a much higher station in life, and maintained a much more expensive establishment than the present defendant. It was proved here that the articles in question were never worn, or in any way displayed, even in the presence of the wife's personal female attendant; and a stronger proof of clandestinity can hardly be imagined. The rule of law is that a husband is liable for goods supplied to his wife, only when they are indispensable for her as necessaries, or suitable to her rank in life as ornaments, and when they are furnished with his knowledge and consent, express or implied. There was certainly no express knowledge or consent by the husband here, nor were there any data from which to imply them; on the contrary, it is clear that the plaintiff originally gave credit to the wife secretly and clandestinely, and having once done that, he cannot be allowed to change his debtor, and now make the husband liable. [Here the Court stopped him.]

BAYLEY, J.—I am of opinion that there was no evidence to go to the jury in this case, such as could entitle the plaintiff to a verdict; and therefore that the rule for entering a nonsuit ought to be made absolute. The rule of law I have always understood to be this: If a husband unjustly turns away his wife, he sends a credit with her, and is bound by any contract she makes for necessaries. If, while they are living together, he refuses to supply her with necessaries himself, although her remedy is in the Ecclesiastical Court, still he may perhaps be liable for such necessaries as she procures upon his credit. But where husband and wife are living together, the husband is not liable for superfluities

1825.

MONTAGUE v. BARON.

furnished to the wife, unless it is proved that the contract is made with his knowledge and consent, so as to constitute the wife his agent duly authorized. Here there was no proof of the husband's consent to the contract, or of any authority conferred by him upon the wife, and the goods supplied were clearly superfluities. At the time of the marriage a sum of 4000*l.*, constituting an income of from 160*l.* to 200*l.* a year, was settled upon the wife. Is it to be presumed, in the absence of proof, that a man like the defendant, living in a ready-furnished house, and keeping no man-servant, would allow his wife to purchase trinkets to the value of about half her income, in a space of six weeks? No man in his senses would permit his wife so to act, and such articles are wholly unsuitable to the wife of a man so situated. Upon the evidence in this case, it appears to me that the plaintiff did, both in fact and in law, give credit to the wife, and not to the husband, and that he was guilty of gross negligence in so doing. It is the duty of every honest tradesman in such a case to find out the husband, and inquire of him whether the wife is authorized to give so large an order; and not to presume, against all reason and probability, that she has such authority. But how did the plaintiff act? He went frequently to the defendant's house, but invariably when the defendant was absent, and absent properly in the course of his business: he had repeated opportunities of seeing the appearance of the house and the style in which the defendant lived, and he ought, from those circumstances, to have suspected that all was not right, and communicated that suspicion to the defendant himself. If the plaintiff could recover in this action, the situation of husbands would be alarming, for they would be continually exposed to liabilities they could neither anticipate nor prevent, and which might frequently reach an amount which it would absolutely ruin them to pay. A husband is not liable to his wife's contracts unless his authority or assent is proved, or there are facts from which it can be presumed. That was laid down by Lord *Holt* in *Ethering-*

1825.

MONTAGUE v. BARON.

ton v. *Parrott* (a), and has been recognized for good law in many subsequent cases. Here there was neither proof of the husband's assent, nor any facts from which to presume it. I am, therefore, clearly of opinion that there was no case to go to the jury; that the action was not maintainable in point of law, and that the plaintiff consequently ought to have been nonsuited.

HOLROYD, J.—I agree in the opinion that the plaintiff must be nonsuited. The goods furnished by him to the wife of the defendant were neither necessary for her use, nor suitable to her station, nor did the plaintiff take the proper means of inquiring whether they were so, or whether they were ordered with the defendant's consent. In point of law, therefore, he trusted the wife, and not the husband, and he did so at his peril. If the defendant could be held liable in this case, no married man would be safe. The plaintiff was bound to inquire upon what authority the goods were ordered, and the onus of proving that he had done so lay upon him. He has not only not proved the husband's authority or consent, but the evidence in the case goes fully to disprove it; therefore the plaintiff made out no case to be left to the jury, and should have been nonsuited at the trial.

LITTLEDALE, J.—I am of the same opinion. The general rule of law is that a husband is not liable upon a contract such as this, unless his assent to it is either proved or can be presumed: if either his express assent is proved, or his implied assent can be presumed, then he is liable. Here there is neither the one nor the other. No express assent was proved, nor was any ever applied for by the plaintiff, and there are no circumstances to warrant the presumption of an implied assent. There are cases in which it has been held that the husband's assent may be implied; as if the wife trades in goods, and buys for her trade, when she co-

(a) Ld. Raym. 1006; 1 Salk. 118, S. C.

1825.

Montague v. Baron.

habits with her husband; 1 *Salk.* 113: or if she buys necessaries when her husband is beyond sea; 1 *Sid.* 127. (*a*). But the goods in this case were not necessary apparel in any sense of the word; they were mere ornaments, equally unnecessary and unsuitable to the party purchasing them. The plaintiff therefore had no cause of action; he was guilty of gross negligence; he trusted the wife of the defendant at his own peril; and he must abide the consequences of his own imprudence.

Abbott, C. J.—I am satisfied, upon the view of the case taken by my learned brothers, that the rule to enter a nonsuit must be made absolute. If the present decision shall have the effect of rendering tradesmen more cautious in their dealings, it will be productive of much benefit to society at large; in some instances to infants, to husbands and fathers, to friends and relatives; and in all instances to the tradesmen themselves; for he who, lured by the expectation of large profit, trusts a party without due caution and inquiry, must find himself deceived in the end, and must ultimately sit down with the loss of the amount for which he has so unjustly and improvidently given credit.

Rule absolute to enter a nonsuit.

(*a*) See Com. Dig. *tit. Baron* and *Feme*, Q.

The King v. The Justices of St. Alban's.

February 3.

Certiorari does not lie to remove the appointment of a surveyor, under the general highway act, 13 *Geo.* 3. c. 78. s. 80. The remedy to the party aggrieved by the appointment, is by appeal to the quarter-sessions.

ON shewing cause against a rule nisi, which had been obtained last term, for removing into this Court by certiorari the appointment of surveyors of highways for the liberty of *St. Alban's*, for the purpose of having the same quashed,

the question was, whether the certiorari was taken away by the general highway act, 13 *Geo.* 3. c. 78. s. 80.

1825.
The King v. The Justices of St. Alban's.

Brodrick and *Platt* shewed cause. It is clear that in this case the certiorari is taken away. By s. 80. of the general highway act, it is in express terms declared, that "no proceedings to be had or taken in pursuance of this act shall be quashed or vacated for want of form, or removed by *certiorari* or any other writ or process whatsoever (except as hereinbefore mentioned) into any of his Majesty's courts of record at *Westminster*." The excepted cases referred to are contained in the 24th section, and relate solely to where roads are presented by justices on their own view as being out of repair. This case, therefore, not being expressly excepted, the general words of the 80th section come into operation, and the appointment of a surveyor cannot be removed into this Court. The rule is, that where there are express remedies given by a statute, and the certiorari is in terms taken away, the disability must operate as against all persons except the crown (*a*). In all other cases the Court is bound by the general words of the act. If that be so, then this, being an application at the instance of a private individual, to remove the appointment of surveyors, the result is, that the certiorari does not lie. If any individual is aggrieved by the appointment, the remedy is by appeal to the sessions, which remedy is given by the same section which takes away the certiorari.

Gurney and *Brougham*, contrà. It is a settled rule in cases of this nature, that the certiorari always lies, unless it is expressly taken away, and an appeal never lies unless it is expressly given by the statute (*b*). Now here the certiorari is not expressly taken away, nor is an appeal given. The appointment of surveyors must, by s. 1. of the Highway Act, be made by the justices at special petty sessions.

(*a*) See *Rex* v. *Thomas*, 4 M. & S. 442, and the cases there collected.
(*b*) See *Rex* v. *Hanson*, 4 B. & A. 521, and *Rex* v. *Cashiobury*, ante, vol. iii. 35.

1825.

The King v. The Justices of St. Alban's.

No appeal is given by s. 80. against any thing done by the special sessions, and therefore the appeal clause gives no relief; the remedy must consequently be by certiorari. It has been decided that if an appeal be not given, the certiorari still lies; *Rex* v. *The Justices of the West Riding of Yorkshire* (*a*) and *Rex* v. *Mitchell* (*b*); which cases are also authorities to shew, that no appeal lies where the act complained of is done at the special petty sessions. There are instances to be found where appointments of surveyors have been quashed; *Rex* v. *Baldwin* (*c*) and *Rex* v. *The Justices of Denbighshire* (*d*); but it is true those have been where the appointments have been mere nullities, and the Court has accordingly directed a mandamus to make fresh appointments. According to what is said by Lord *Kenyon* in *Rex* v. *Baldwin*, if there is any objection to the appointment of surveyors, the party objecting should first remove it into this Court by certiorari, and then move to quash it. This therefore seems an express authority to shew that the certiorari is not taken away. Sect. 80. enacts, that if any person shall think himself aggrieved by any thing done in the execution of the act, for which no particular method of relief hath been already appointed, he may appeal to the quarter-sessions, by whom the matter of *such* appeal shall be finally determined; and then it declares, that no proceedings had in pursuance of the act shall be quashed or vacated for want of form, or removed by certiorari. Now it is quite clear that this is not a case in which an appeal lies; and if so, then the certiorari is not taken away. Assuming that the proper remedy is by appeal, it can hardly be said that the act of appointing a surveyor is a thing done, in respect of which any individual can complain. On these grounds the rule for a certiorari must be made absolute.

Abbott, C. J.—Supposing, upon the true construction of the words of the 80th section, by which the writ of certiorari is taken away, that they must be confined to the cases

(*a*) 5 T. R. 629.
(*b*) 5 T. R. 701.
(*c*) 7 T. R. 169.
(*d*) 4 East, 142.

in which an appeal is given, then it becomes incumbent on the party applying for the writ, to shew that this is a case in which there could be no appeal. I am of opinion that this is a case in which there may be an appeal, and therefore it would be unnecessary to determine whether, upon the true construction of the words, the certiorari is taken away; for it would be sufficient to say, that the remedy must be by appeal in the first instance. The language of the clause giving the appeal is, "If any person shall think himself or herself aggrieved by any thing done by any justice or justices of the peace, or other person, in the execution of any of the powers given by this act, and for which no particular method of relief hath been already appointed, every such person may appeal to the justices of the peace at any general quarter-sessions of the peace, to be held for the limit wherein the cause of such complaint shall arise." Now the act of appointing a surveyor of the highways is an act done by justices of the peace in pursuance of the powers given by the statute. That is a matter about which there can be no doubt. It is said, however, that the appointment of surveyor is by justices sitting in special petty sessions. I can find no distinction between an act done by justices assembled in what are called petty sessions, and the act of any other justices. The appeal is given generally to the justices at quarter-sessions, to any person aggrieved by any thing done by *any* justice or justices of the peace or other person. I do not find any word which excludes the right of appealing against any thing done by the special petty sessions, and therefore there is no pretence for saying that this is a case in which the appeal is taken away. It is said that in this instance no person can be said to be aggrieved by the appointment of surveyor of the highways. If that be so, it must be said that no person can have a right to complain or apply to have the appointment quashed. But I am of opinion that if there be an improper appointment of a surveyor, every inhabitant of the parish or liberty, if aggrieved, has a right to appeal. Independently, however, of this con-

1825.

The King v. The Justices of St. Alban's.

struction as to the right of appeal, I take it to be quite clear that the 80th section takes away the writ of certiorari. The words are general—" no proceedings to be had or taken in pursuance of this act shall be removed by certiorari into any of his Majesty's courts of record at *Westminster*." This is a proceeding had and taken in pursuance of the act, and therefore the certiorari does not lie.

Bayley, J., Holroyd, J. and Littledale, J. concurred.

Rule discharged, but without costs.

Friday, February 4.

Josephs v. Pebrer.

Where an association calling themselves "*The Equitable Loan Bank Company*," issued shares, transferable without restriction, and assumed to act as a corporate body without an act of parliament or a royal charter:—Held, that they violated the 6 *G.* 1. c. 18. ss. 18. and 19., and that a broker could not maintain an action against his principal for the price of certain of such shares purchased at the request of the latter.

Semble, That such an association, issuing transferable shares and assuming to act as a body corporate, in anticipation of obtaining an act of parliament to sanction their proceedings, is illegal at common law.

THIS was an action for work and labour and commission, and for money paid to the defendant's use. Plea, the general issue, non assumpsit. At the trial before *Littledale*, J., at the *London* adjourned sittings after last *Trinity* Term, it appeared in evidence that the plaintiff, who carried on the business of a broker on the *Foreign Stock Exchange*, had been employed by the defendant, on the 7th *April* last, to purchase for him ten 50*l.* shares in an association called "*The Equitable Loan Bank Company*," the object of which was (as stated by the plaintiff's counsel) to advance money to needy persons at a lower rate of interest than licensed pawnbrokers are by law entitled to demand. At that time the shares had not been distributed, and the plaintiff was to purchase them for the "coming out." The plaintiff accordingly purchased the shares, for which he paid a deposit of 1*l.*, and 5*l.* 10*s.* as a premium, on each share, and on the 23d *April* delivered to the defendant two certificates in the following form:

1825.

JOSEPHS v.

" *Equitable Loan Ba... ompany.*

Capital, two millions ... ing, in shares of 50*l.* ...

[Here followed a list ... presidents, vice-presidents, directors, ... uditors, ...]

No. 16,156 to 16,160 inclusive.

This certificate declares that the sum of 1*l.* having been paid as a deposit for each of the above-mentioned shares of 50*l.* each, the holder of this certificate will be entitled to those five shares in the *Equitable Loan Bank Company*, with all the benefits and emoluments, but subject to the future payments on the shares, and all matters contained in any act of parliament for the regulation of the company; and in the mean time to such conditions, regulations and orders as the vice-presidents and directors grounding the present committee of management may direct."

Then followed the signatures of two directors.

The defendant having objected to take the shares or pay for them, on the ground that the certificates ought to have been delivered to him sooner, the present action was brought. For the defendant it was objected, that the association in question was in violation of the 6 *Geo.* 1. c. 18. ss. 18. and 19., and consequently that all contracts for the purchase of any shares therein were illegal and void. Two other objections were taken; first, that assuming the action maintainable, still there was no evidence of the identity of the shares supposed to have been purchased by the plaintiff for the defendant; and second, that the certificates could not be received in evidence without a stamp. All these objections were reserved by the learned Judge, and the plaintiff had a verdict, with liberty to the defendant to move to enter a nonsuit.

Gurney in *Michaelmas* term obtained a rule nisi to enter a nonsuit, on the first objection taken at the trial.

Marryat and *Andrews* now shewed cause. Assuming that there is any thing illegal in the association called " *The*

1825. Josephs v. Pearer.

Equitable L[illegible] Company," still that objection cannot affect the plaintiff's right to recover back money which he has paid at the defendant's express instance and request. It is immaterial to the plaintiff, as respects his right of action, for what purpose the money is to be [illegible]. But, if the defendant directs him to make the payment, and desires him to make the purchase. This action is not brought to enforce a contract for the purchase of shares in this company, but to recover back money which the plaintiff has paid out of his own pocket at the defendant's express desire and to gratify his personal views. It is no answer, therefore, to this action to say, that the defendant has induced the plaintiff to lay out his money for an object which turns out to be illegal. The plaintiff is not to sustain an injury by a transaction in which he is a perfectly innocent party. But, in fact, there was nothing proved at the trial which could impeach the legality of this association, and bring it within the operation of the 6 *Geo.* 1. c. 18; and the onus lay upon the defendant to prove that it was illegal. The supposed objection to this company is, that they have issued transferable shares, not being incorporated either by act of parliament or royal charter. But it is not every association formed for the purpose of issuing transferable shares that is illegal, even though it be not incorporated by charter or statute. It must be shewn that the association is a nuisance to all the king's subjects in order to bring it within the operation of the statute 6 *Geo.* 1. In the case of *Rex* v. *Webb* and others (*a*), which was an indictment on that statute against the defendants for a nuisance in raising a transferable and assignable stock, for the purpose of buying corn, and grinding and making it into flour and bread, and dealing in and distributing the same, the Court held that the indictment would not lie, although the shares were transferable, and the defendants were not incorporated. [*Bayley*, J. The Court were there of opinion that, as the shares were not generally transferable, but only in the neighbourhood where the asso-

(*a*) 14 East, 406.

ciation was formed, and not to the public at large, the case was not within the statute.] That case at all events shews that it is not every association of this kind that is illegal. It does not follow because the shares of this company are transferable in the first instance, that the undertaking is therefore a nuisance. There was nothing to shew that this association had any tendency to prejudice the king's subjects, and unless that fact was established, the objection could not arise. But whether that be so or not, still such an objection does not lie in the mouth of the defendant, at whose instance the plaintiff has laid out his money. The case of *Petrie* v. *Hannay* (a) does not apply to this, but even if it did, that case, if it has not been since distinctly overruled, has been so confined and narrowed in its operation as not to affect the right of an innocent party to recover back money which has been paid, at the instance of another, for an illegal purpose.

1825.

JOSEPHS v. PEBBER.

Gurney and *Chitty*, contrà, were stopped by the Court.

ABBOTT, C. J.—I am of opinion that enough did appear at the trial of this cause to shew that the action was brought in furtherance of a contract which was void in law. Whether, upon a more perfect explanation of the objects of this association, by those who were interested in maintaining the legality of the contract, another conclusion might properly have been drawn, we need not decide. My present opinion is founded upon the evidence as it is laid before us in this case. Upon the evidence it appears that a certain number of persons had associated themselves together for the purpose of establishing what they called "*The Equitable Loan Bank Company.*" The particular objects of this company did not distinctly appear in evidence, but it was stated by the learned counsel, in opening the plaintiff's case, (and therefore as against his client the fact must be taken to be so,) that the object was to lend money at illegal interest,

(a) 3 T. R. 418.

1825.

JOSEPHS v. PEBRER.

namely, at eight per cent. There can be nothing contrary to law in persons forming themselves into an association even for a purpose of that kind, if it should be ultimately legalized and established, either by an act of parliament or by a royal charter of incorporation; but if the association go farther, and before an act of parliament is obtained or a royal charter granted, they take upon themselves to make the shares or interest in their joint stock and capital transferable at pleasure, without restriction or limit, and also to provide that those who become purchasers of such shares or interest in the joint stock shall, in the mean time, submit themselves to the order and direction of certain persons calling themselves directors, and a committee of management, it appears to me, that then the association assumes an unlawful shape in practice. The words of the 6 *Geo.* 1. c. 18. are very large and comprehensive, though certainly they are not altogether free from doubt and obscurity. But it is obvious that the 18th and 19th sections had those two objects in view which I have already pointed out, and shew that they are such as the legislature particularly intended to prohibit, namely, the raising of transferable stock, and also acting as a corporate body, without the authority of an act of parliament or a royal charter of incorporation. The 18th section begins by reciting, as a matter of notoriety, "that several undertakings or projects of different kinds had theretofore been publicly contrived and practised, or attempted to be practised, within the city of *London* and other parts of the kingdom, which manifestly tended to the common grievance, prejudice and inconvenience of great numbers of his Majesty's subjects in their trade or commerce, and other their affairs; and the persons who contrived or attempted such dangerous and mischievous undertakings or projects, under false pretences of public good, did presume, according to their own devices and schemes, to open books for public subscriptions, and draw in many unwary persons to subscribe therein towards raising great sums of money, whereupon the subscribers or claimants under them did pay small

1825.
JOSEPHS v. PEBRER.

proportions thereof, and such proportions in the whole did amount to very large sums; which dangerous and mischievous undertakings or projects did relate to several fisheries and other affairs, wherein the trade, commerce, and welfare of his Majesty's subjects, or great numbers of them, were concerned or interested. And whereas, in many cases, the said undertakers or subscribers had presumed to act as if they were corporate bodies, and had pretended to make their shares in stocks transferable or assignable without any legal authority either by act of parliament, or by any charter from the crown for so doing, &c." and then proceeds to enact, "That all and every the undertakings and attempts described as aforesaid, and all other public undertakings and attempts, tending to the common grievance, prejudice and inconvenience of his Majesty's subjects, or great numbers of them, in their trade, commerce, or other lawful affairs, and all public subscriptions, receipts, payments, assignments, transfers, pretended assignments and transfers, and all matters and things whatsoever, for furthering, countenancing, or proceeding in any undertaking or attempt, *and more particularly the acting, or presuming to act, as a corporate body or bodies, the raising, or pretending to raise, transferable stock or stocks*, the transferring, or pretending to transfer, or assign, any share or shares, in such stock or stocks, without legal authority either by act of parliament, or by any charter from the crown, to warrant such acting as a body corporate, or to raise such transferable stock or stocks, or to transfer shares therein, &c. shall for ever be deemed to be illegal and void, and shall not be practised, or in anywise be put in execution." By the 19th section, all such undertakings shall be deemed public nuisances. Now what appears to have been done in this case? According to the certificates given in evidence, this company professes to be an association formed with a capital of two millions sterling, in shares of 50*l.* each; so that in order to raise such a capital there must be at least 40,000 shares, and then the certificates declare, "that the

1825. JOSEPHS v. PEBRER.

sum of one pound being paid as a deposit upon each share, the holder will be entitled to have those shares in the company with all the benefits and emoluments, but subject to the future payments on the shares, and all matters contained in any act of parliament for the regulation of the company." This is an express declaration that the shares of this company, as it is called, are to be transferable at the pleasure of any holder, whoever he may be. There may be a given number of shares, but at the time these certificates first issue it is quite uncertain who will be the person who may afterwards become as holder a partner in the concern. Anybody who thinks fit may become a shareholder, without any restraint. Another thing is, that they are to be held in the meantime subject to such "conditions, regulations, and orders, as the vice-presidents and directors grounding the present committee of management may direct." That is taking upon themselves not merely to act as a corporate body, but as a select body capable of making byelaws. That seems to me plainly to be the object of the association. What then is the mischief and grievance of all this? We see here that these shares, which were to be obtained upon the payment of 1*l.* as a deposit, were sold at a premium of 5*l.* 10*s.* In this Court we cannot shut our eyes to what is going on in the world around us; and we cannot help observing and knowing, that there are at this time associations calling themselves companies, in which shares of this kind are established, and that there is a dealing and trafficking in them to an extent which never before existed, unless at the period when the 6 *Geo.* 1. was passed. The effect of such a practice is necessarily to lead to gaming and speculation, and to all the mischiefs affecting the property of persons, which gaming and rash speculation are calculated to produce. In such transactions, if one man gains by gaming, another must necessarily be a loser; whereas, if trade and commerce are legitimately carried on, both the buyer and seller of merchandise, each in his turn, will obtain his due share of profit. But, in

transactions of this nature, no man can gain without the irretrievable loss of his fellow. In the view, therefore, in which this case is presented to us upon the evidence, (unless something more had been shown on the part of the plaintiff,) I cannot forbear saying, that this is an association, the effect of which must be highly mischievous, by reason of the encouragement which it gives to gaming. It contains and embodies within itself two of those signs and tokens which the stat. 6 *Geo.* 1. has pointed out as evidence of the illegality of such an association, namely, issuing transferable shares, and acting as a corporate body without an act of parliament or a royal charter. We are bound, therefore, to come to the conclusion, that an association thus formed, and so acting, comes within the operation of the statute, and consequently that a contract relating to the sale of shares in such an association is illegal and void.

Bayley, J.—I have no doubt that the association in question, evidenced as it is by the documents produced at the trial, is within the meaning of the 6 *Geo.* 1., and that the sale of these shares by the plaintiff is an illegal transaction, in respect of which no action can be maintained. I agree with my Lord Chief Justice in thinking, that the language of the statute is not free from ambiguity; but the recital in the 18th section has reference in terms to associations of this description. In the first place, this company had created transferable shares, and in the second, it had presumed to act as a corporate body without the sanction of an act of parliament or a royal charter of incorporation. This case is perfectly distinguishable from *Rex* v. *Webb*. In that case, it is true, the shares were transferable; but they were not transferable generally to the public without restriction. The object of that society was to supply the inhabitants of *Birmingham* with corn, flour and bread. No person could hold above a certain number of shares, and those shares could not be transferred, unless the transferree, who must have been a resident in the neighbour-

1825.
JOSEPHS v. PEBRER.

hood, was first approved of by the company, and then entered into the covenants by which all shareholders were bound. On those grounds the Court held, that the case did not come within the statute. So in *Pratt* v. *Hutchinson* (a), where the shares were transferable only sub modo, the Court held the case out of the statute. There fifty persons had agreed to raise 200 shares, at 210*l*. each, by small monthly subscriptions, for building houses for each other, every holder paying interest on his shares till paid up; with a stipulation for the members to employ certain tradesmen only in the building; with power to each member to sell his shares and transfer them in the books of the society; *provided, that the purchasers should be approved* at a meeting of the society, and should, on his admission, *become a party to the original articles.* These are the only cases which come within my recollection, in which the question has been raised upon this statute, but they are both perfectly distinct from the present. Here the shares are transferable without restriction to the public, and the company assume to act as a corporation without lawful authority, and as the tendency of such an association is highly mischievous, I think it falls within the prohibitions of the statute.

HOLROYD, J.—I am of opinion, that as this company assumes to act as a corporate body without an act of parliament or the King's charter, and also to issue transferable shares, it comes within the operation of 6 *Geo.* 1. c. 18; and that being so, the plaintiff cannot maintain an action for money laid out at the instance of the defendant, in the purchase of shares in a concern, which in itself is illegal.

LITTLEDALE, J.—I think this society falls within the prohibition of the statute, it having in my opinion a tendency to prejudice great numbers of the King's subjects. The indicia of illegality pointed out in the statute, as re-

(a) 15 East, 511.

spects such societies, are "more particularly the acting or presuming to act as a corporate body, the raising or pretending to raise, transferable stock or stocks, &c. without legal authority, either by act of parliament, or by any charter from the crown." It appears from the body of the certificates given in evidence, that this company have issued transferable shares, and that they have presumed to act as a body corporate, without any lawful sanction. In the case cited by Mr. *Marryat*, it was proved, that the society had not a tendency to aggrieve the King's subjects; but on the contrary its object was to effect a benefit; and it was there distinctly proved, that the shares were not transferable except sub modo. Here they are transferable without any restriction whatever, and as such a society has a manifest tendency to aggrieve many of the King's subjects, I think no action can be maintained for the value or price of shares therein. It is true, this money was laid out at the instance and request of the defendant, but I think that does not alter the case. The plaintiff himself ought to have known that it was a contract in respect of which no action could be maintained.

ABBOTT, C. J.—In delivering my judgment I meant to have added, that as at present advised, I am strongly inclined to think, that to bargain for shares of this description is illegal at common law, for it is in effect wagering and bargaining about an act of parliament, hereafter to be passed, which no man has a right to speculate upon.

Rule absolute (*a*).

(*a*) See H. B. 380. 1 Taunt. 6. 9 East, 516. 4 Taunt. 587. and 1 Camp. 547. 549.

Tuesday, February 4.

ATKINSON *v.* COTESWORTH.

The master of a vessel has no lien upon freight for his wages or other demands, unless it is matter of express stipulation between him and his owner. Therefore, where a master entered into a contract of affreightment, not under seal, and the shipper agreed to pay the freight at the end of the voyage by a bill at two months without saying to whom:—Held, that the owner was entitled to receive the freight, without the intervention of the master, and that the freighter was not liable to the captain upon the contract, after he had paid the owner.

THIS was an action of assumpsit on a charter-party of affreightment, (not under seal,) whereby it was mutually agreed between the plaintiff, *commander* of the ship *Agaphea*, then lying in the river *Thames*, and the defendant, that the said vessel should take a cargo to *Pernambuco*, and bring a cargo thence to *London* or *Liverpool*, according to the directions of the charterer's agent in the *Brazils*, and deliver the same on being paid freight, at and after a certain rate therein mentioned, by a good bill, payable at two months from the day of the final discharge of the vessel. Breach, non-payment of the freight. Plea, non-assumpsit, and issue thereon. At the trial before *Abbott*, C. J. at the *London* adjourned sittings after last *Trinity* term, the case proved was this:—The owner of the *Agaphea*, Mr. *David Hodgins*, who resided in *Ireland*, had appointed the plaintiff to be master and commander of the vessel, and in that capacity the latter entered into the charter-party of affreightment with the defendant for the voyage in question, and proceeded with the vessel to *Pernambuco*. Before the vessel returned to *England*, Mr. *Hodgins*, being dissatisfied with the plaintiff's conduct, appointed a Mr. *Bain* as his agent to receive the freight of the defendant, and a notice to that effect having been given to the latter, he paid *Bain* the freight on the delivery of the cargo; but before doing so, the plaintiff had demanded the freight of the defendant, and threatened that if it was not paid to himself instead of *Bain* an action would be brought. On the part of the plaintiff it was contended that he only had a right to sue for and receive the freight, inasmuch as the charter-party had been entered into with him, and there was nothing to shew on the face of the contract that Mr. *Hodgins* had any thing to do with the vessel. The Lord Chief Justice was, however, of opinion, that although the plaintiff might, as master of the vessel, ac-

cording to the terms of the charter-party, have received the freight, yet as he was merely the agent of the owner, if the latter intervened and desired the charterer to pay the freight to him, he had a right so to do, and consequently the action, under the circumstances of this case, could not be maintained. The plaintiff was therefore nonsuited, but leave was given to him to move to enter up a verdict for 80*l.* which it was admitted was due to him from the owner.

Gurney, in *Michaelmas* term, obtained a rule nisi accordingly, against which

Scarlett and *Campbell* now shewed cause. This action is not maintainable. It may be true that the charter-party is entered into by the plaintiff, but that gives him no authority to sue, if the owner of the vessel interposes and desires the freight to be paid to a third person. The freight belongs to the owner and not to the master. There is nothing in the relation between master and owner which prevents the latter from discharging the former. The master is only the agent for the owner, and as all contracts of this nature are entered into for the benefit of the principal, he may interpose at any time and terminate the captain's agency. If by the terms of a charter-party the captain may sue for freight, he can only do so for the same reason that a factor may maintain an action for his principal; but if the principal intervenes, his authority ceases. In this case, if the owner had not interposed, the plaintiff might have maintained the action for the owner's benefit, but by the intervention of the latter his authority was gone. The captain may have his lien upon the freight for his wages, when it actually comes into his hands, and he would have a right to set-off his claim against the freight, in the event of the owner suing him for the amount; but that question does not arise here. The question here is, whether the captain has a right to receive the freight, as against and in defiance of the owner, in order to satisfy a prospective lien for his wages? It must be a

1825.

ATKINSON v. COTESWORTH.

strong case which is to make out the affirmative of that proposition. This is the first time indeed that such a position was ever contended for. Will it be said in a court of law that a discharged master of a vessel has a right to tell the freighter, that he must not pay his freight to the owner, but to him, (the captain,) in defiance of the owner himself? If it be admitted that the freight is due to the owner of the vessel, it would be monstrous to hold that the captain could insist upon receiving it against the express wishes of his employer. It is an acknowledged rule of law that a factor has a right to receive money upon a contract made by himself for the benefit of his principal, and that when he has received the money he has a lien upon it for any advances made, but if the principal intervenes and receives the proceeds of the goods, the factor could have no remedy against the vendee, so as to compel him to pay a second time. This case stands exactly on the same principle. Here the charter-party does not say that the money shall be paid to the master, and therefore giving full effect to the fact that the contract was entered into with the plaintiff, still there is nothing to prevent the owner from interposing and exercising his right over the freight at any time. They cited *Smith* v. *Plummer* (*a*) as an authority expressly in point, it being there held that the master of a ship has not a lien on the freight for his wages, or for his disbursements on account of the ship during the voyage, or for the premiums paid by him abroad for the purpose of procuring the cargo (*b*).

Gurney and *Chitty*, contrà. The owner of the vessel having exercised his election in giving the master power to enter into the contract for freight, instead of making the contract himself, has put it out of his power to receive the freight, except through the medium of the captain, and subject to such

(*a*) 1 B. & A. 575.

(*b*) Vide *Wilkins* v. *Carmichael*, Doug. 101. *Hussey* v. *Christie*, 9 East, 426. *White* v. *Baring*, 4 Esp. N. P. C. 22. Abbott on Shipping, pt. ii. c. 3.

lien as the latter may have on the proceeds. Here the parties to the contract are the plaintiff and the defendant, and the liability of the latter arises solely out of the contract so formed. The plaintiff, therefore, has a primary right to receive the freight, which cannot be defeated by the intervention of the owner. Here the defendant expressly contracts to pay the freight to the plaintiff and to no other person. There is nothing on the face of the charter-party which shews that Mr. *Hodgins* had any interest in, or was at all connected with the vessel. It was not competent to the owner, therefore, to interpose, and by taking to the contract, to turn the plaintiff adrift and let him seek his remedy for his wages as he might. Admitting that the case of a charter-party under seal is different from this, still upon every principle of law, the person who makes the contract must be entitled to maintain the action. The relation of master and owner of a vessel cannot be assimilated to that of master and servant or principal and agent. The captain of a ship stands in a very different situation. He is himself notoriously liable in many respects as a principal, as for necessaries, seamen's wages, &c. His situation, therefore, cannot be compared with that of an agent, who stands precisely in the shoes of his principal where he acts within the scope of his authority. The contract here is of a very peculiar nature, and distinguishes this case from *Smith* v. *Plummer*, because it does not appear that there was any contract in that case to pay the freight to the captain. Here the contract is expressly made with the captain, and for any thing that appears to the contrary he may be considered as the owner, though he is described as the commander. The owner, by permitting the plaintiff to enter into this contract, relieves himself from liability for the performance of all the specific agreements contained in the charter-party. He could not be sued on this instrument for any breach of its covenants, he not being bound by its stipulations. [*Abbott*, C. J. That must not be taken for granted. You must not assume that the owner could not be sued upon this contract.]

1825.

ATKINSON v. COTESWORTH.

1825. ATKINSON v. COTESWORTH.

Surely he could not upon this instrument, he being no party to it. [*Bayley*, J. It might be matter of evidence that the owner authorized the captain to make the contract with the defendant as his agent and for his benefit. *Littledale*, J. On the face of the contract the plaintiff is only called "commander," which is a strong circumstance to shew that he was not contracting in his own right.]

ABBOTT, C. J.—I confess I am unable to discover any solid distinction between this case and *Smith* v. *Plummer*, and therefore, on the authority of that case, I am of opinion that a nonsuit must be entered. The distinction attempted to be made between this case and that is, that in *Smith* v. *Plummer* it does not appear whether the ship had sailed under a charter-party made by the master, who there claimed a lien upon the freight, whereas here the ship sailed under a charter executed in the name of the master. Now assuming that in the former case the ship had sailed without a charter-party, still the freight would become due generally under the bill of lading, signed by the captain of the vessel. Looking then to the charter-party in this case, there is nothing to distinguish it from the common bill of lading in that respect. All that the charter-party says is, that upon the arrival of the goods the defendant shall pay the freight by a good bill payable at two months from the day of final discharge; but it does not say to whom he is to pay the bill. The instrument itself leaves the person who is to receive the freight entirely in doubt. It stands, therefore, precisely on the same footing as a common bill of lading. That being so, the principle decided in *Smith* v. *Plummer* is exactly in point, namely, that the master has no lien upon freight for his wages, and cannot prevent the owner from interposing to receive the freight earned by his vessel. Undoubtedly if the freight had been paid to the plaintiff, without notice by the owner to the defendant to withhold it, such payment would have been valid, and would have discharged the defendant; but as the master has no

prospective lien for freight, he has no right to receive it, as against and in defiance of the owner.

Bayley, J.—The case of *Smith* v. *Plummer* decided that, as between the owner and the master, the latter is the proper person to receive the freight. Then in this case it is clear that the owner was entitled to receive the freight, unless he had done something to deprive himself of that right. Has he done so? The charter, which is said to be the contract between the parties to this record, certainly contains nothing to restrain the owner's common law right. Here no consent was proved on the part of the owner that the plaintiff should receive the freight. It was competent to the captain to stipulate that he should have a lien on the freight, but he has not done so. The charter-party makes no provision that the freight shall be paid to the captain. The defendant is to pay freight, at and after a certain rate therein specified, by a good bill payable two months from the day of final discharge. To whom is it to be paid? It is to be paid to the person who by law is entitled to receive it, namely, the owner, unless he has tied himself up by a specific contract to the contrary.

Holroyd, J.—I am also of opinion that the nonsuit was right. The captain has by law no lien upon freight, or for any claim he may have on the owner of the ship, unless it be by an express contract giving him such a right. Here the charter-party, though it is in terms entered into by the captain, contains nothing which is to deprive the owner of his right to interpose and receive the freight, and, consequently, I think, payment by the defendant to the owner is an answer to this action.

Littledale, J.—Without an express restraint upon the owner, to which he is himself a party, his right to receive the frieght cannot be diminished by the contract entered into by the captain with the freighter.

Rule discharged.

1825.

Tuesday, February 8.

The stat. 11 *G.* 2. c. 19. s. 16., which gives a summary remedy to landlords whose tenants have deserted their premises with rent in arrear, and no sufficient distress, by *requesting* two justices, on their own view, to deliver possession, does not require the request or complaint to be made *upon oath*. Therefore, where in trespass against two magistrates for turning a tenant out of possession under this act, a record of the proceedings, drawn up conformably to the statute, was given in evidence:— Held, that it was a complete defence to the action, though they did not appear to have acted on the *oath* of the landlord.

Basten *v.* Carew and another.

THIS was an action of trespass for breaking and entering the plaintiff's house and closes, and evicting him therefrom. Plea, not guilty, and issue thereon. At the trial before *Abbott*, C. J. at the last *Devonshire* Assizes, the case was this:—

The plaintiff was lessee of a farm and premises at the rent of 280*l.* and was under covenant with his landlord to repair, &c. The defendants were justices of the peace for the county of *Devon;* and the alleged trespass was in delivering possession of the farm and premises to the plaintiff's landlord, for a supposed vacant possession, under the statute 11 *Geo.* 2. c. 19. After the trespass had been proved, the defendants gave in evidence the record of their proceedings under the statute, which was to the effect following:— "*Devonshire.* Be it remembered, that on &c., at &c., *C. D. H.* Esq. of &c., in the said county of &c., complained unto us, *J. W. Carew* and *C. O. Osmond,* Esquires, two of the justices of our said lord the king, assigned to keep the peace within the said county, &c., that he, the said *C. D. H.*, did demise at rack rent, unto *J. Basten,* of &c., husbandman, a messuage and tenement, called &c., consisting of &c., situate, lying, and being at &c., aforesaid, in the county aforesaid, and that on &c., there was in arrear and due unto the said *C. D. H.*, from him the said *J. Basten,* the tenant of the said demised premises, half a year's rent thereof, and that he, the said *J. Basten,* hath deserted the said demised premises, and left the same uncultivated and unoccupied, so as no sufficient distress could be had to countervail the said arrears of rent; whereupon the said *C. D. H.* then and there, to wit, on &c., at &c., *requested* of us, the said justices, that a due remedy should be provided, according to the form of the statute in that case made and provided; which complaint and request by us, the aforesaid justices,

being heard, we (having no interest, nor either of us having any interest in the said demised premises,) on &c., at &c., did personally go upon and view the said demised premises, and then and there upon our own proper view, did find the said complaint to be true, and did then and there fix at the most notorious part of the said premises, to wit, upon the outer door of the mansion-house, a notice in writing, under our hands and seals, that we, the said justices, on &c., would return to take a second view thereof; upon which said &c. we did return to take a second view of the said premises, and there upon our own proper view did find that he, the said *J. Basten*, did not appear, nor any person on his behalf, to pay the said rent in arrear, and that there was no sufficient distress upon the said premises, nor upon any part thereof, to countervail the said arrear of rent; therefore we, the said justices, at &c., on &c., did put the said *C. D. H.* into possession of the said demised premises, according to the statute aforesaid. In witness &c." This record, it was contended, must, on the authority of *Brittain* v. *Kinnaird* (*a*), be taken as conclusive evidence of the truth of the facts stated therein, and afford a full defence to the action. As to the formality of the record, (which was copied from a precedent in *Burn's Justice* (*b*),) the case Ex parte *Pilton* (*c*) was cited as giving the sanction of this Court to that form. For the plaintiff it was contended, that as the complaint set out on the record did not appear to have been made *on oath*, the adjudication of the justices thereon was of no force or validity, and therefore afforded no defence to the action. The Lord Chief Justice thought there was much weight in this objection, but doubted whether it could be taken advantage of any where but at the assizes, upon appeal pursuant to s. 17. of the act. To this it was answered, that supposing the objection had succeeded at the assizes, still the plaintiff would have his remedy by action for damages at law. The learned judge then allowed the case to pro-

1825.
BASTEN v. CAREW.

(*a*) 4 J. B. Moore, 50. S. C. 1 B. & B. 432.
(*b*) 1 Burn, 916. Ed. 24th, by Chetwynd. (*c*) 1 B. & A. 369.

1825.

BASTEN v. CAREW.

ceed, reserving to the defendants liberty to move to enter a nonsuit upon two questions, first, whether the instrument in question was a proper record of the proceedings, the complaint not appearing to have been made on oath; and second, whether the objection could be agitated in this Court. The case went to the jury upon the merits, and under the learned judge's directions, a verdict was found for the defendants.

Wilde, Serjt. in *Michaelmas* Term, obtained a rule nisi for a new trial, on two grounds, first, that the verdict was against the weight of evidence, and second, that the jury had been misdirected in point of law. On shewing cause now, however, the argument turned solely upon the question as to the formality of the record upon which the defence was founded, and therefore it is unnecessary to notice the other points.

Pell, Serjt. *Tancred*, and *Chitty*, shewed cause. It is no objection to the validity of the record, that it does not appear that the complaint made by the plaintiff's landlord was taken upon oath. The record in this case stands upon the same footing as a conviction on a penal statute, and must be taken as conclusive evidence of the facts which it purports to recite, and is a full defence to the action; *Brittain* v. *Kinnaird* (*a*). Now it is a general rule with respect to convictions, that it is not requisite that the information should be upon oath, if it be not enjoined by the letter of the statute (*b*). Here the statute does not require the complaint to be made, or the evidence taken on oath. By sect. 16. of 11 *G*. 2. c. 19. it is merely enacted, that two justices may, at the *request* of the landlord, go upon and view the premises, and affix on the most notorious part thereof, notice in writing, what day they will return to take

(*a*) 4 J. B. Moore, 50. S. C. 1 B. & B. 432.

(*b*) *Rex* v. *Willis*, Bosc. 16. Payley on Convictions, 2d Ed. by Dowling, 20. Id. 70.

a second view, and if on such second view the tenant shall not appear and pay the rent, or there shall not be sufficient distress on the premises, then the justices may put the landlord in possession. The record in this case was drawn from a precedent in *Burn's* Justice (*a*), which was approved of in Ex parte *Pilton* (*b*). In commenting upon this very statute *Dr. Burn* (*c*) makes these observations: "And the justices in this and all other the like cases, ought to make a record of the whole proceedings, to be produced afterwards in case of an action brought against the landlord by such tenant. For the justices are not to carry witnesses with them about the country, to testify what they shall act as judges of record; nor does it seem requisite they should go and testify in a Court upon their oaths what they should have acted in such cases; but to make a record in writing under their hands and seals, of all that hath been done; which record, being produced in Court, seemeth to be the proper evidence in all such cases, for that the law reposeth an entire confidence therein, and it shall not be gainsaid; otherwise there would be no end of things." Here the justices have drawn up a record of their proceedings, strictly pursuing the requisites of the statute; and as there is no obligation on their part to take the *request* (for it is no more) of the landlord upon oath, it would have been unnecessary for them to have done so. Had the legislature intended that the request or complaint should be made on oath, doubtless the act would have been so expressed, as is the case in sect. 4. by which, in the case of fraudulent removal or concealment of goods, not exceeding the value of 50*l*., two justices, on complaint exhibited in writing, may summon the parties concerned, examine the fact and all proper witnesses *upon oath*, &c. But there is an obvious reason why in this particular case the complaint should not be taken on oath, for here the justices are to proceed on their *own* view, and satisfy themselves by ocular inspection,

(*a*) 2 Burn, tit. "Distress," 916. Ed. 24. (*b*) 1 B. & A. 369.
(*c*) 2 Burn, 893. Ed. 24.

1825.
BASTEN v. CAREW.

whether in point of fact there is a vacant possession, before they interpose on behalf of the landlord. If they are satisfied of that fact, then they have jurisdiction to determine accordingly, without the evidence of other witnesses upon the subject. There are other cases in which the magistrates are not required to have the oath of the party in order to give them jurisdiction. For instance, in the case of forcible entry and detainer, the magistrates act upon their own view, without oath, and even though the consequences are much more serious to the party than here; yet the record of the proceedings only shews a complaint, and not the evidence, upon which the justice proceeds (a). On these grounds the instrument produced at the trial was a perfect record, and affords a complete answer to this action.

Wilde, Serjt. in support of the rule. The document given in evidence in this case and called a record, is not entitled to that character, and therefore is not conclusive for the defendants. The statute, on which this question arises, arms the justices with extraordinary powers, which, being liable to abuse, ought to be construed with the utmost strictness. In the first place, the act authorizes an ex parte proceeding against the tenant. There is no provision made for giving him notice of the justice's intention to visit the premises, or that the landlord has made any complaint. He has no right to be heard in answer to the application. Though he may not have actually quitted his farm, yet any individual may go and tell the magistrates that there is rent in arrear, and that the premises are deserted. Upon this hearsay information, without any notice to, or inquiry of, the tenant, although he may be within a few hundred yards of the spot, the magistrates may go to the place, and if he happens not to be at home, they are bound to conclude, perhaps against the truth of the case. [*Bayley*, J. The determination of the magistrates is not conclusive. An appeal is given to the assizes.] It is no answer to the present

(a) See the precedents, 2 Burn, 470. et seq. 24th Ed.

action, that the party has another remedy elsewhere. The question is whether this is such a record as can upon any principle of law be thought conclusive in this action. [*Abbott*, C. J. When the magistrates go first, and find the premises vacant, they are bound to affix a notice on the premises of their intention of coming again. If, upon their coming a second time, they find the premises are not deserted, or there is a sufficient distress on the premises, their jurisdiction is gone.] But the only circumstance which is material to the tenant takes place without any notice to him. The statute provides, that in case a certain amount of rent shall be due, and the premises shall be deserted, the magistrates may without any previous communication with the tenant, or giving him an opportunity of traversing the assertion of his landlord, go and view the premises, and come to the conclusion upon the fact, without oath, that there is rent in arrear, or that the premises have been really deserted, or only left for a temporary occasion. Before the justices come to this conclusion, the tenant is precluded from going into the question, and satisfying them that the representation of the landlord is untrue, and that the premises have not in fact been deserted. He is therefore concluded, ex parte, by the first visit, upon those points which give the justices jurisdiction, and if at the end of 14 days he does not pay his rent, or if there be no sufficient distress on the premises, the justices may put the landlord into possession. It is clear upon the face of this supposed record, that the justices have not acted upon the information of the landlord given on oath. This is supposed to be a judicial, and not a ministerial act. Now it is an universal principle of law, as well as of natural justice, that no man should be concluded by the judgment of any tribunal until he has been heard in his defence, except where there is default on his part, after due notice and warning. Here the magistrates act judicially; and the party is to be bound by their judgment. Upon what then is their decision founded? Why merely upon the hearsay evidence of ano-

1825.
BASTEN v. CAREW.

ther, upon a statement not made under the sanction of an oath. What security then has the subject for the due administration of this important jurisdiction? Suppose false information is given to the magistrates, under such circumstances, the information not being given under the obligation of an oath, no proceeding by indictment for perjury will lie, nor does it appear that the party would have any remedy by action against his landlord, for maliciously causing the magistrates to act. In the case of the magistrates, no action would lie against them, unless there was conclusive evidence that they acted from corrupt motives. It seems to have been settled by the case referred to on the other side, that the record of a conviction shall be taken as conclusive evidence of the facts therein stated, and operate as a complete defence to the magistrates, but this must be understood to mean, where the magistrate proceeds upon the oath of the party who causes him to interpose his jurisdiction. If in the present case this supposed record is to operate as a defence to the magistrates, the plaintiff has no remedy whatever. They stand upon this record after notice of the error which appears upon the face of it. Magistrates, by a strange anomaly in the law, have power, even after action brought for an unlawful act done by them, of drawing up their conviction afresh, and correcting any error which may appear upon the face of their proceedings. This opportunity was not taken in the present instance. The defendants have omitted to amend a defect which might easily have been supplied, and therefore they cannot now avail themselves of that rule of law by which the record of their proceedings is to be a defence. Will this Court hold that this record is to be conclusive of the truth of the facts which it professes to set out, when those facts have been stated behind the back of the party who is to be affected by them, and when they are not even stated upon oath? Does it need the express direction of an act of parliament to require, that in proceedings so serious in their result, the same solemnity, the same regard to the first principles of justice,

should be observed, by which the proceedings of all magistrates sitting judicially are conducted? Will it be intended from the silence of this act of parliament, that the legislature, in giving so summary a jurisdiction, meant that the magistrates should adopt a different mode of proceeding from that which takes place in every jurisdiction, high or low, in the country? If the magistrates are empowered to proceed ex parte, à fortiori, they ought not to act unless upon the oath of the party who sets them in motion. The acknowledged rule of law, governing every tribunal acting judicially, and the principles of common justice require that the magistrates shall act upon the oath of the party, and upon his oath only. Unless there is something in this act which compels the Court judicially to say, that a subject of the realm may be ousted of his house and land, without notice, upon the ex parte hearsay statement of his landlord, then the Court, proceeding according to the genius and principles of the law of *England*, will hold that this is not a record, in point of law, which will afford any defence to these magistrates.

ABBOTT, C. J.—At the trial of this cause, the record of the proceedings in question was given in evidence as a decisive answer to this action, and on the authority of the case of *Brittain* v. *Kinnaird*, I was pressed to nonsuit the plaintiff. The objection now urged by my brother *Wilde*, to the validity of the instrument as a record, was then taken. I entertained some doubt upon the point, and I did that which I am in the habit of doing on all occasions where I entertain doubt, I forbore to nonsuit, and suffered the cause to proceed, in order that if hereafter it should turn out that I was mistaken in my opinion, the parties might not be put to the expense of a second trial. But in the shape in which the case now comes before the Court, this rule must be discharged, if I ought then to have nonsuited; and upon consideration, and paying due attention to all the arguments now used, I am of opinion that I ought to have nonsuited the

1825. BASTEN v. CAREW.

plaintiff. I take it to be a general rule and principle of law, that where justices of the peace have an authority given to them by an act of parliament, and they appear to have acted within their jurisdiction, and to have done all that the particular statute requires them to do in order to originate their jurisdiction, their conviction drawn up in due form, and remaining in force, is conclusive evidence for them in any action which may be brought against them for the act so done. In this particular case it is said that there would be great hardship if we were to hold that the record in question were to have that effect. That topic has, however, been pressed to an extent which the circumstances of the case and the law will not warrant. In the first place, there is, by the 17th section of the statute, a summary remedy given in the nature of an appeal to the assizes, whereby, if any wrong has been done to the tenant, he may have redress, and have the matter examined into by a second tribunal, and this at no great risk; for if it is decided against him, the costs to be awarded against the appellant cannot exceed the sum of 5*l*. In the second place, he has another remedy; for although the record of the proceedings below may be conclusive in favour of the justices, yet it will not be so with respect to the landlord, who, if the rent be not actually due, may be liable to an action on the case for having maliciously and improperly caused the magistrates to proceed under the statute, if there be any wrong done. There are many cases in which, though no action will lie against a magistrate who is acting bonâ fide and according to law, upon the information laid before him, yet an action lies against the party for giving the information, if it be false and malicious, and with a view of working an injury. The act of parliament upon which this proceeding arises does not direct the magistrates to make any inquiry upon oath. Are we then to impose upon them the necessity of doing so? Are we to say that by forbearing to make the inquiry upon oath, and forbearing to state upon the record that they made the inquiry upon oath, they have done wrong? Are

we to say under these circumstances that they have not done all that the legislature requires them to do? It would be extremely hard upon justices of the peace, and those also who are to act in such situations, if, having an act of parliament presented to them, applying their attention to it, and doing all that upon reading it they can find the legislature requires of them, they shall be subject to an action of trespass, because they have not done something, which the act does not require them to do. The act no where says that the complaint or information shall be made upon oath, or that the rent shall be proved to be due in that mode. All that it says is, that "if any tenant holding lands, tenements, or hereditaments, at a rack-rent, or where the rent reserved shall be full three-fourths of the yearly value of the demised premises, who shall be in arrear for one year's rent, shall desert the demised premises and leave the same uncultivated or unoccupied, so as no sufficient distress can be had to countervail the arrears of rent, it shall and may be lawful to and for two or more justices of the peace of the county, riding, &c. (having no interest in the demised premises,) at the *request* of the lessor or landlord, or his or her bailiff or receiver, to go upon and view the same, and to affix on the most notorious part of the premises notice in writing what day (at the distance of fourteen days at least) they will return to take a second view thereof, &c." That is all that the act requires. The justices are, on *their own* view, to determine whether or not the premises are deserted. Suppose they should refuse, upon request, to do that which the landlord requires them to do; or suppose all the magistrates of the neighbourhood chose to refuse, this act of parliament, which was intended by the legislature to give a beneficial remedy to landlords, could not be executed without the interposition of this Court. The case last put is certainly an extreme one, and not very likely to occur; but supposing such a case to exist, and an application were made to this Court for a mandamus, it is exceedingly difficult to say that we should not be bound to direct

1825. BASSEN v. CAREW.

a mandamus to compel them to go and view the premises. But, however, the material and the important ground of my judgment is, that inasmuch as the legislature does not require the justices to receive the complaint or make the inquiry on oath, the record of these proceedings under this act need not shew that the complaint or inquiry was so made. These defendants have done every thing which the legislature has required of them, and that being the case, we think the record reciting the facts therein stated, is conclusive on their behalf, leaving to the party such other remedy as he may have against his landlord, if the latter has improperly set the justices in motion.

BAYLEY, J.—I am of the same opinion. This is an action, not against the landlord, who sets the justices in motion, and who, if he improperly and without just grounds sets them in motion will be answerable for any injury which the tenant sustains, but an action against the magistrates for what they have done, on the ground that they were not warranted in the act they did. The only question then is, whether upon the face of their proceedings they appear to have acted within the scope of their authority. Now the 11 *Geo.* 2. c. 19. s. 16. does not require that there shall be a complaint made to the justices on oath, but simply that the magistrates shall upon the *request* of the landlord go and view the farm, and if upon seeing it they find it in the state described, a notice is to be affixed on the most notorious part of the premises, stating that on a certain day the justices will return; and then if the rent remains in arrear, and there is no sufficient distress, they are to put the landlord into possession. All, therefore, that the justices are required to do, is to act upon their own view when the complaint is made. It is said that this is a harsh mode of proceeding, and leaves the justices to act in a way that may be most oppressive to a tenant. That assumes that the justices will act corruptly. If they do so, then they certainly are not exempt from punishment for such corrupt misconduct.

Then it is assumed that the party is without remedy. That is clearly not so, because he has a perfect remedy against his landlord if he improperly requires the magistrates to act; but when the legislature has required the magistrates to act upon their own view, and has not imposed upon them the necessity of receiving the complaint on oath, it would, in my opinion, be a most mischievous course of proceeding if they were afterwards, at their own peril, to be subject to the expense of an action, and to be saddled with all the costs which such an action must produce. The party has also another remedy by appeal to the justices of assize, which is given by the seventeenth section, if brought within the time there stipulated. In this case, as the justices have done every thing which the act requires them to do, and as the record of their proceedings is drawn up conformably to the directions there given, that record is conclusive evidence in their favour, and is an answer to this action.

Holroyd, J.—I also agree with the judgment given by my Lord Chief Justice and my brother *Bayley*. This is an action of trespass against magistrates who have acted in discharge of a duty committed to them by an act of parliament, and the question is, whether the record of their proceedings is conclusive in their favour. It is objected to the record that it should appear that the complaint had been made on oath. I think there is no weight in that objection, because the complaint is not directed by the act of parliament to be taken on oath, and need not be in any case unless it is otherwise directed by the particular statute. Informations are not generally laid on oath, but if they are afterwards to be established by evidence, then the oath is to be administered to the witnesses. Here the magistrates appear to have acted in pursuance of the directions of the statute, and therefore the objection has no foundation. That being so, I apprehend it to be an established rule, that the record of the justices, acting in pursuance of their au-

thority, is conclusive in their favour, if an action be brought against them. If, indeed, they have corruptly made a record different from the facts of the case, in order to make it appear to be within their jurisdiction when it is not so, they will be liable to criminal prosecution. The statute in question gives the magistrates jurisdiction to act at the *request* of the landlord, and whether his statement be true or false they have power to view the premises and investigate the complaint. So far the justices clearly have jurisdiction. If they are induced to act upon a request which is supported by a false representation respecting the rent supposed to be in arrear, then the party aggrieved has his remedy by action on the case against the landlord for maliciously causing the justices to act. But the justices having jurisdiction to ascertain whether or not the tenant has deserted the premises, they are for this purpose judges of record. It has been holden on the statutes of forcible entry that they are judges of record. In *Floyd & Barker's* case it is said (*a*), "if a justice of peace record that upon his view as a force, which is no force, he cannot be drawn in question either by action or indictment." In 1 *Salk.* 397, quoting 27 *Ass.* 19, there is this passage: "a judge of oyer and terminer, where the jury found and presented a fact to be a trespass, caused their finding to be entered as a felony, and yet could not be punished by indictment or otherwise, because he was a judge of record, and the indictment against him was to defeat his record by averring against what he did as a judge of record." Again, in *Strickland* v. *Ward* (*b*), which was an action of trespass for false imprisonment against a magistrate, a conviction of the plaintiff for unlawfully returning to a parish after having been legally removed from thence without bringing a certificate, and also a warrant reciting the conviction, were given in evidence as a defence to the action; and Mr. Justice *Yates* held, that the conviction could not be controverted in evidence; adding, that the justice having

(*a*) 12 Rep. 25. (*b*) 7 T. R. 634.

competent jurisdiction of the matter, his judgment was conclusive till reversed or quashed; and that it could not be set aside at nisi prius, and consequently the plaintiff was nonsuited. If indeed the justices have no jurisdiction in the matter in which they act, they are liable to an action of trespass, as was held in *Morgan* v. *Hughes* (*a*), where a magistrate maliciously granted a warrant against the plaintiff without any depositions before him, upon a supposed charge of felony. In *Miller* v. *Scrace* (*b*), which, however, has been since overruled in *Doswell* v. *Impey* (*c*), it was held that an action would lie against commissioners for committing a bankrupt who did not answer to their satisfaction, and this was on the ground that commissioners are not judges, but *De Grey*, C. J. admitted that they would have been protected had they been acting as judges; but the important part of his judgment for this purpose, is where he says, "so justices of the peace may be justices of record, when made so by act of parliament, as in case of riots, force, going armed, &c. in which case their records are not traversable." Here, then, these defendants having recorded proceedings respecting a matter which is clearly within their jurisdiction, the parties are concluded by the record, which not being traversable is a good defence to the action. Undoubtedly the jurisdiction of justices may be abused, but if there is any corrupt abuse of their powers, the law provides a remedy against them. Where, however, they confine themselves within their jurisdiction, but are improperly set in motion by the landlord, the tenant may have redress by action against the latter. On these grounds I think this rule must be discharged (*d*).

Rule discharged.

(*a*) 2 T. R. 225.
(*b*) 2 Sir W. Bl. 1145.
(*c*) Ante, vol. ii. 350.
(*d*) *Littledale*, J. was absent.

1825.

Tuesday, February 8.

A rated inhabitant of a parish cannot sue an overseer for the penalty given by 17 *G.* 2. c. 3. s. 2., for refusing an inspection of the rate books, unless he shews that he has been *injured* by the refusal.

The demand of an inspection under this statute must be made at a reasonable time and place; therefore, where the demand was made at a parishioner's own house at eight o'clock in the evening, and not at the house of the overseer:—Held, that the overseer incurred no penalty by refusing.

A parishioner is entitled by the same statute to have, on demand, a copy of the rate *forthwith* delivered to him, upon paying 6*d.* for every twenty-four names:—Held, that the overseer is entitled to a reasonable time to make the copy.

SPENCELEY *v.* ROBINSON.

IN debt on the statute 17 *Geo.* 2. c. 3., the first count of the declaration stated that plaintiff was an inhabitant of the township of *Coxwould*, in the north riding of the county of *York*, and that defendant was one of the overseers of the poor of said township; that on 26th *March*, 1824, the churchwardens and overseers of the poor of said township made a rate for the relief of the poor, which was afterwards duly allowed by two justices; and that the churchwardens and overseers, after the allowance of the rate, gave public notice thereof in the church. Averment, that plaintiff requested defendant as such overseer to permit him, the plaintiff, to inspect the rate, and tendered to him one shilling for the same; yet defendant neglected and refused to permit plaintiff to inspect the rate, contrary to the form of the statute in such case made and provided, whereby defendant forfeited 20*l.* Second count, that plaintiff, at a reasonable time, to wit, on &c. at &c. demanded of defendant, so being such overseer, a copy of the rate, and was ready and offered to pay defendant at and after the rate of sixpence for every twenty-four names thereof, yet defendant wholly neglected and refused to give him the copy, contrary to the form of the statute, &c. whereby, &c. Plea, the general issue, and issue thereon. At the trial before *Bayley*, J. at the last *Summer* Assizes for *Yorkshire*, the case was this: The plaintiff was a rated inhabitant of the township of *Coxwould*, and the defendant was one of the overseers of the poor of that township. On the 26th *March* the rate in question was made, allowed on the 27th, and published on the next day. In the evening of the 19th *April*, about eight o'clock, the plaintiff sent his son to the defendant, desiring an interview at his, the plaintiff's, house. The defendant called on the plaintiff, and was introduced to

1825.

SPENCELEY v. ROBINSON.

his attorney. The plaintiff then demanded an inspection of the rate, and tendered one shilling to the defendant for his trouble in exhibiting it. To this the defendant replied, "I dare not do it; I have been ordered not to allow an inspection." A copy of the rate was then demanded by the plaintiff's attorney, but refused for the same reason. The defendant afterwards consulted a neighbouring magistrate, whom he informed what had taken place, and told him he had not shewn the rate, because he was informed he was not obliged to do so. The magistrate however told him he was bound to shew the rate to every rated inhabitant, and pointed out to his attention the 2d section of the act of parliament; and by his advice the defendant, in about two hours after the inspection had been refused, returned to the plaintiff's house and offered to shew him the rate, and next morning at an early hour delivered a copy of it (which had been made in the course of the night) to the plaintiff's attorney. The attorney then said the copy came too late to enable him to give notice of appeal on behalf of the plaintiff at the next sessions. Upon which the defendant said there need be no difficulty on that head, for he would waive all objection to the notice being out of time. It appeared that on the 17th *April* the plaintiff's attorney had met the defendant at *Helmsey* market, about eight miles from *Coxwould*, and then asked him if he had a copy of the rate, telling him that he had been employed by the plaintiff, and was desirous of seeing it. The defendant immediately promised that he should have a copy if he was entitled to it. Upon which the attorney informed him that he should be at *Coxwould* on the 19th, when he should expect to have a copy delivered to him. Under these circumstances, the learned Judge, having pointed out to the jury the provisions of the 2d section of the statute, which requires that the churchwardens and overseers shall permit every inhabitant to inspect the poor's rate at all seasonable times, paying one shilling for the same, and shall upon demand *forthwith* give a copy of the same, at the rate of sixpence for every

1825.

SPENCELEY v. ROBINSON.

twenty-four names, left it to them to say, whether there had been a substantial compliance on the part of the defendant with the requisites of the statute. The defendant was entitled to a reasonable space of time to enable him to comply with the obligations of the statute. It was true, that at one time the defendant had in a qualified manner denied an inspection of the rate, and also refused a copy of it, but the question was whether that denial and refusal had not been done away with by what occurred subsequently, for the defendant within two hours afterwards returned to the plaintiff and told him he might inspect the rate, and early next morning delivered a copy of it to his attorney. If the jury were of opinion that the defendant had complied with the demand within a reasonable space of time, his lordship thought the defendant entitled to a verdict. Verdict for the defendant.

Brougham, in *Michaelmas* Term, obtained a rule nisi, for a new trial, on two grounds; first, that the verdict was against the weight of evidence; and second, that the jury had been misdirected; for the defendant having once refused to allow the plaintiff to inspect the rate and give him a copy, a right of action had accrued, which could not be devested by a subsequent compliance.

Scarlett and *Alexander* now shewed cause. By the statute 17 *Geo.* 2. c. 3. s. 2. it is enacted, "That the churchwardens and overseers of the poor, or other persons authorized as aforesaid, in every parish, township, or place, shall permit all and every the inhabitants of the said parish, township, or place, to inspect every such rate at all seasonable times, paying one shilling for the same; and shall upon demand forthwith give copies of the same or any part thereof, to any inhabitant of the said parish, township, or place, paying at the rate of sixpence for every twenty-four names." And by sec. 3. it is enacted, "That if any churchwarden or overseer of the poor, or other person authorized as aforesaid,

1825.

SPENCELEY v. ROBINSON.

shall not permit any inhabitant or parishioner to inspect the said rates, or shall refuse or neglect to give copies thereof as aforesaid, such churchwarden or overseer, or other person authorized as aforesaid, for every such offence shall forfeit and pay to the party aggrieved the sum of twenty pounds, to be sued for and recovered by action of debt, &c." Two offences are created by this statute; first, where the overseer shall not permit the inhabitant to inspect the rate at all seasonable times; and second, where he shall refuse or neglect to give copies of the rate forthwith, upon demand being made. The first question here is, whether there has been a demand made of an inspection, and of a copy of the rate, so as to found this action. Now the demand must be made at a reasonable time and place. At what time and place was the demand in this case made? According to the testimony of the plaintiff's son it was made at eight o'clock in the evening, at the plaintiff's own house. Eight o'clock in the evening is clearly not a seasonable time, still less is the plaintiff's own house the proper place to make such a demand. There is no obligation on the overseer to carry the rate books about with him in his pocket, nor is he under the necessity of shewing them at any hour at which an inhabitant may choose to demand an inspection. The proper depositary for the rate books is the overseer's own house, and the demand must be made at some hour suiting his reasonable convenience. Both the time and place therefore at which the demand in this instance was made, were improper, and would have justified the defendant's refusal. But assuming that the time and place were proper for making the demand, the second question is whether there has not been a substantial compliance with the requisites of the statute. The defendant at first refuses, upon a mistaken supposition that the plaintiff has no right to what he demands. He takes advice upon the subject, and within two hours afterwards he goes to the plaintiff's house and tells him he may inspect the rate; and the very next morning, at an early hour, a copy is delivered to the

1825.
SPENCELEY v. ROBINSON.

plaintiff's attorney. This, therefore, was a substantial compliance with the exigency of the statute. Some time must be allowed to make a copy of the rate, and the overseer may well take reasonable time to consider whether he will allow an inspection of it, if he doubts the authority of the party making the demand. At all events this was a question of fact for the jury. They were to determine whether the defendant had complied with the requisites of the law within a reasonable time, and they having found for the defendant, their verdict cannot be disturbed (*a*). But, in the third place, no cause of action arises to the plaintiff in this case. By the statute, s. 3. the penalty is to be given to the party *aggrieved* by the refusal. In what respect was this plaintiff aggrieved? The object of seeing the rate and having a copy was to appeal to the sessions. There was nothing, however, to have prevented his giving notice of appeal at all events to the next sessions. He might then have entered, and moved to respite the appeal until the following sessions, which the justices have a power of doing under 17 *Geo.* 2. c. 38. s. 4. But here the defendant offered to waive all objection to the notice of appeal; and supposing that would not have been sufficient, still the objection might have been waived in open Court by consent, under the 41 *Geo.* 3. c. 28. s. 5. (*b*). On these grounds there is no reason why the verdict should be disturbed.

Brougham, contrà. The action in this case is not given as a remedy by way of damages for some injury suffered by the party, in consequence of the refusal or laches of the overseer to allow an inspection and deliver a copy of the rate. Whether the party be aggrieved or not, whether he has suffered from the misconduct of the overseer, whether the plaintiff's notice of appeal would be bad or not, or whether a waiver could be given effectually of due notice, on the part of the lay-payers, are perfectly immaterial ques-

(*a*) See 1 T. R. 168, and 6 East, 10 and 14.
(*b*) See *Rex* v. *Sheard*, ante, vol. iv. 480.

1825.

SPENCELEY v. ROBINSON.

tions in this case, for the statute does not merely impose the penalty in the event of the party having sustained an injury, but says in express terms, that if the churchwarden shall not permit an inspection, or shall refuse or *neglect* to give a copy of the rate, he shall be subject to the penalty, without any regard to the loss or injury sustained by the party aggrieved. The overseers are public officers, and this is a duty imposed upon them imperatively, which if they neglect or refuse to perform, they are liable to the penalty, and therefore whether the plaintiff be aggrieved or not by reason of the refusal, his right of action to recover the penalty accrues the moment the overseer is guilty of a breach of his duty. It is quite beside the question whether the plaintiff could have given an effectual notice of appeal to the next sessions or not, because it does not lie in the mouth of the overseer to say in answer to this action, "though I had a certain defined duty cast upon me by the statute, yet you have no right to complain of my breach of that duty, unless you shew that you have sustained a consequential injury." The principal objection on which this motion was made has received no answer whatever on the other side. At the trial the question left to the jury was not whether the demand was made at a reasonable time and place, but first, whether the refusal was peremptory, and second, whether the demand had not been complied with within a reasonable time afterwards. It is to this mode of leaving the case to the jury that the objection arises. Now if the refusal in the first instance was peremptory, (of which there is no doubt, the evidence being all one way,) the reasonableness of the time within which the demand was afterwards complied with, is a question which cannot affect the plaintiff's right of action. Whether the demand was made at a reasonable time and place, was certainly a question for the jury; but the reasonableness of the time of complying with the demand was a question of law, but that could not arise after there had been once a positive refusal. There is no doubt upon the evidence, that on the evening of the 19th

April, the defendant positively refused to allow an inspection and give a copy of the rate. Upon that refusal the plaintiff had a complete right of action, and that right could not be devested by a subsequent compliance. Undoubtedly it might have been left to the jury, as a question of fact, whether the whole conduct of the defendant amounted to a refusal, or to a determination not to accede to the plaintiff's request, but here there was no doubt that a positive refusal had taken place in the first instance, and that gives a right of action which could not afterwards be devested. In a late case of *Sheppard* v. *Matthewson*, before *Littledale*, J. at *Hereford*, which was a similar action on the same statute, the churchwarden having taken an hour to consider whether he would comply with the request or not, the learned judge left it to the jury to say, as a question of fact, whether there had been a request and refusal within a reasonable time, but he laid it down broadly, that if there be once a refusal clearly proved, the subsequent compliance an hour afterwards would not devest the right of action. Here there was a positive refusal distinctly established, and therefore compliance two hours afterwards will not avail the defendant.

ABBOTT, C. J.—I think if we were to grant a new trial in this case we should convert this act of parliament into an instrument whereby a sharp and cunning attorney might be enabled to oppress an ignorant unlettered man, called upon by law to exercise a troublesome and burthensome office. The only doubt that has occurred to my mind, after hearing the report of this case read, has been, not whether the case had been properly left to the jury, but whether the learned judge should not have taken upon himself to nonsuit the plaintiff. Not having been nonsuited, I think the plaintiff has no reason to complain of the manner in which the case has been left to the jury, for he had every chance of their finding in his favour. This action is brought on the statute 17 *Geo.* 2. c. 3. s. 2, by which it is enacted, "that the churchwardens and overseers shall permit all the inhabitants of the

parish, township or place, to inspect every such rate at all seasonable times, paying one shilling for the same, and shall upon demand *forthwith* give copies of the same or any part thereof to any inhabitant of the said parish, township, or place, paying at the rate of sixpence for every twenty-four names." Upon this it is to be observed, that the person to whom the inspection is to be allowed, and the copy furnished, must be an inhabitant of the parish. If he sends his attorney, the overseer is not bound to attend to his request, unless the attorney comes with his client, and therefore the defendant in this case was not bound to take any notice of the request made by the plaintiff's attorney of the 17th *April.* The third section enacts, "that in case any overseer shall not permit any inhabitant or parishioner to inspect the said rates, or shall refuse or neglect to give copies thereof, such churchwarden or overseer, for every such offence, shall forfeit and pay to the party *aggrieved* the sum of twenty pounds." The words of the statute giving the penalty appear to me to import, that there must be some person who has sustained an injury by the act of the overseer, before any penalty is incurred. Unless there be some party *aggrieved,* I do not see how it is competent for him to sue. Now was this plaintiff aggrieved by any thing done by the defendant? If he meant to appeal (and probably he did) he might have entered his appeal at the next sessions, and then have given a notice in order that it might be heard at the following sessions, the justices having power to direct an adjournment. I see no objection to that mode of proceeding. Did the defendant, or did he not, comply with that which the act of parliament requires? Before an overseer can be sued for not allowing an inhabitant to inspect the rates, the demand must appear to have been made at a convenient time and place. First, as to the time, it must be at such an hour as may be reasonably supposed convenient to the overseer, and not at any hour that the party may think proper to make his demand. Here, according to the evidence, the demand is made at some hour in the

1825.

SPENCELEY v. ROBINSON.

evening, (the precise hour is left in some degree of doubt,) when perhaps it might be very inconvenient to the defendant, who probably had his own affairs to mind, to attend to the message sent him. Second, as to the place, it must be at the residence of the overseer, where the rate may probably be supposed to be, unless some other place of deposit is directed. But instead of going to the house of the defendant, the plaintiff sends a message desiring him to attend him at his, the plaintiff's own house. The defendant was not bound to go, still less was he obliged to carry the rate book with him. It was the business of the plaintiff to call upon him at his house, at a convenient and proper time. But when he goes, does the defendant positively refuse to allow an inspection and copy of the rate? No, he merely says, "I dare not do it; I am ordered not to do it. I shall not shew it unless I am bound so to do; unless the law compels me." This is at some hour of the evening which is not well ascertained. But doubting whether he was justified in not shewing the rate, he immediately takes the advice of a magistrate, as to the course he should pursue, and the very same evening he goes to the plaintiff's house and tenders the book for inspection. The very same night also he makes a copy of the rate, and next morning delivers it to the plaintiff or his attorney. Upon this state of facts it is clear that the demand was not made either at a reasonable time or place. But assuming the demand of a copy of the rate to have been properly made, still the defendant was entitled to a reasonable time to comply with the demand. Here it is complied with in as short a time as could reasonably be expected. A copy is made in the course of the night, and the next morning it is delivered. It is said that my learned brother did wrong in leaving it to the jury merely to say whether the defendant had complied with the provisions of the statute within a reasonable time; and it is objected that the reasonableness of the place was not put to them. No point of that kind was raised at the trial; but in leaving it to the jury in the way my learned

1825.

SPENCELEY v. ROBINSON.

brother did, that necessarily involved the question whether there had been a legal demand, namely, a demand at a reasonable time and place. Complying within a reasonable time involves both time and place. The jury were to decide whether the demand was made at a reasonable time and place, and they have determined the question against the plaintiff. For these reasons it appears to me, that the case was properly submitted to the jury, and that they have given the right verdict; and I am strongly inclined to think that the demand not having been made at the defendant's house, the learned judge ought to have directed a nonsuit the moment that fact was ascertained.

Holroyd, J.—It appears to me that the plaintiff is not entitled to recover. I was struck, in the early part of the argument in this case, with the question, whether there was a legal demand or not, it not having been made at a reasonable time or place, which last, it appears to me, ought to be at the overseer's own house, and not at the house of the party making the demand. I think therefore the demand was not sufficient. But upon the other point, I am also of opinion that the plaintiff was not a party aggrieved. He could not be said to be aggrieved unless he was placed in a worse situation with respect to his rights. There is no proof that he was in any respect aggrieved, because he might still have entered an appeal at the sessions, supposing the refusal to have taken place. Upon the statutes relating to bankrupts, it has been held that unless a party be a creditor, he cannot be considered as a party aggrieved within the intent and meaning of the bankrupt law.

Bayley, J.—In this case I was of opinion that the plaintiff alone was entitled to inspect the rate books, but I had great doubt whether he had a right to insist that his attorney should be present at the time. I thought at the trial, and do now think, that the request made by the attorney in the presence of the plaintiff, at his the plaintiff's own house,

1825.

SPENCELEY v. ROBINSON.

was not a sufficient demand to bring the defendant within the penalties of the act; but I was desirous that the whole case should go to the jury. On the other point, it struck me, that the defendant, not being a lawyer, and ignorant of the express provisions of the statute, might very reasonably refuse to comply with the demand made, until he had inquired of those who knew better, and that he was entitled to a reasonable time to make that inquiry. The question then was, whether, though there was something which at first looked like a refusal, the defendant did not afterwards comply with the request within a reasonable time. This was the way I left the case to the jury (a)

Rule discharged.

(a) *Littledale*, J. was absent.

DRANT v. BROWN, executor of LEGGOTT.

Tuesday, February 8.

Where a proposal was made *in writing* by A. to let a piece of land to *B.* on certain terms contained in a written agreement between *B.* and *C.*; and *A.* afterwards agreed by *parol* that *B.* should have the land upon the terms proposed:—Held, in an action for a breach of the agreement, that the original proposal was re- ...able in ...e with- ...p.

IN assumpsit on a special agreement the declaration stated, that in consideration that plaintiff would let to *John Leggott*, the testator, a certain piece of ground to be dug for clay to make bricks, the latter undertook not to dig deeper than three feet; but in breach of his said agreement he dug five feet deep, and thereby injured the land. The declaration contained other counts, on a quantum meruit for suffering and permitting the testator to dig and carry away a quantity of clay; for clay bargained and sold to the testator, and by him dug and carried away; for use and occupation of a close by the testator; and on an account stated between the plaintiff and the testator. Plea, the general issue, and issue thereon. At the trial before *Bayley*, J. at the last *Summer* assizes for the county of *York*, the case was this:—On the 15th of *March*, 1815, the plaintiff and the testator met at a public-house, when the latter complained to the former that he expected to lose a plot of land which he had agreed to

rent of a person named *Grant*, on certain terms, for the purpose of digging brick earth. Upon which the plaintiff said, that if the testator's bargain with *Grant* went off, he would let him have a piece of his (plaintiff's) own land on the same terms. The agreement with *Grant* was then exhibited to the plaintiff, and being desired by the testator to reduce his proposal to writing, he drew up the following statement:—"Memorandum, that I *George Drant*, do hereby offer to Mr. *J. Leggott* the clay of two acres, two roods, and twenty perches of land, for the purpose of making bricks, upon the same conditions as the said *J. Leggott* hath made with *J. Grant*, the conditions being shewn that now exist between *J. Leggott* and *J. Grant*, and a price according to quantity being allowed. This agreement to be void on the 1st of *April*, if no further arrangements are entered into." This paper was signed by the plaintiff but not by the testator. The agreement between the testator and *Grant* having gone off before the 1st of *April*, the plaintiff and the testator again met, when the latter entered into a verbal agreement with the former to take his piece of land on the terms which he had offered in writing. In support of the plaintiff's case, the agreement between the testator and *Grant* was produced as evidence of the terms on which the land had been taken. This instrument was stamped, for the purpose of this action, with an agreement stamp. Upon this evidence the plaintiff proposed to rest his proof of the agreement, when it was contended, for the defendant, that the written offer made by the plaintiff should also be given in evidence. The plaintiff's counsel then called upon the defendant to produce it in pursuance of a notice for that purpose, and it was accordingly produced; whereupon it was objected by the defendant's counsel that it could not be read for want of a stamp, and, as it was essential to the maintenance of the action, he contended that the plaintiff must be called. The learned judge was, however, of opinion that as the paper was only a proposal, and was silent upon the subject of the depth to which

1825.
DRANT
v.
BROWN.

the clay was to be dug, the plaintiff was not bound to give it in evidence as part of the agreement, but that if he was, it was admissible as a proposal only without a stamp. The paper was accordingly received and read in evidence, and the breach of the agreement, assigned in the declaration, being proved, the plaintiff had a verdict, with liberty to the defendant to move to enter a nonsuit, if the Court should be of opinion that the paper in question was improperly admitted without a stamp.

J. Williams having, in *Michaelmas* term, obtained a rule nisi accordingly,

Scarlett (with whom was *F. Pollock*) now shewed cause. The plaintiff having proved his case by a parol agreement entered into according to the terms of a written agreement, which had theretofore existed between the testator and *Grant*, it was wholly unnecessary that he should give in evidence the written proposal in question. But, at all events, the written proposal made by the plaintiff, and the agreement between the testator and *Grant*, formed together but one agreement, and as the latter was stamped, that was sufficient to let in the former without a stamp. If an agreement be composed of several parts, and written on different sheets of paper, it is sufficient that one only be stamped. Here, however, the proposal was not itself the agreement between the parties. The foundation of the action was the parol agreement afterwards entered into upon the basis of *Grant's* agreement and the plaintiff's proposal, and when once it was proved what the parol agreement was, enough was done to entitle the plaintiff to maintain the action. At all events the plaintiff might have given the proposal in evidence as parol proof of the terms of the contract, in which point of view a stamp was unnecessary. At the time the parol agreement was made, all the terms specified in both papers were repeated. [Here the Court stopped him.]

1825.

DRANT
v.
BROWN.

Williams and *Parke* contrà. The proposal, as it was called, was in fact the contract between the parties, and if so, it clearly could not be received in evidence without a stamp. It refers in terms to the agreement between the testator and *Grant*, and but for that circumstance that instrument would incontestably have been inadmissible as evidence between these parties. In form, the second paper might, in the first instance, be a mere proposal, but in the result it became the contract between the parties, and the moment it was proved to be in existence the plaintiff could not stir a step without producing it in evidence, and for that purpose a stamp was necessary. If, however, it was not the contract between the parties, still it was evidence of the contract, and that is sufficient to bring it within the operation of the stamp act. But admitting it to be only an offer, yet the moment it was accepted it became the contract, and the only binding evidence of liability. For this *Adams* v. *Lindsell* (*a*) seems an authority. In that case the defendant had by letter offered to sell to the plaintiff certain specified goods, *receiving an answer by return of post*. The letter being misdirected, the answer notifying the acceptance of the offer, arrived two days later than it ought to have done. On the day following that, when it would have arrived if the original letter had been properly directed, the defendant sold the goods to a third person; and it was held that there was a contract binding the parties from the moment the offer was accepted, and that the plaintiff was entitled to recover against the defendant in an action for not completing his contract. In the present case the written proposal cannot be considered as parcel of the stamped agreement between the testator and the plaintiff, so as to take it out of the operation of the stamp acts. The exception in the stamp act is only where a bargain is contained in several letters. But this is not a letter. It is in express terms a memorandum of agreement. The plaintiff says at the close, "this agreement to be void, &c." and, therefore, it has all the requisites

(*a*) 1 B. & A. 681.

1825. Drant v. Brown.

of a contract between the parties, and as it was afterwards adopted as the basis of the contract, it could not have been received without a stamp. No principle of law is so clearly established as that, if the parties, after a parol offer, reduce their agreement into writing, the written agreement alone can be received. Here the contract being in writing, it falls within that general rule, and as it was not stamped the plaintiff ought to have been nonsuited.

Abbott, C. J.—I yield entirely to the proposition of law laid down by the defendant's counsel, that if parties begin to treat by parol, and afterwards reduce their contract into writing, that writing is the confirmation and perfection of the agreement, and that alone can be received in evidence. But here the order of things is reversed. At the first meeting the parties talk upon the subject, and then the plaintiff draws his proposal in writing, which is signed by himself, but not by *Leggott*. Though that takes place at the first meeting, still no agreement is entered into. It is wholly uncertain whether there will be one or not; for it depends upon the fact whether *Leggott* should have the benefit of a contract previously made with a person named *Grant*. That fact being ascertained in the negative, the parties meet again, and then it is agreed verbally that *Leggott* shall have the land on certain terms; but, as at their first meeting, there was no instrument in writing signed by the defendant. The instrument signed by the plaintiff at the first meeting was nothing more than a proposal. What took place between the parties at the second meeting was the binding agreement, and that was wholly in parol. The plaintiff having therefore made out his case by legitimate evidence, before the paper was produced, and as the production of it did not operate upon the case so previously made out, by shewing that there was a written contract, I am of opinion that there was no foundation for the objection to the plaintiff's right of action.

1825.

DRANT v. BROWN.

BAYLEY, J.—The stamp act only attaches upon agreements, and minutes or memorandums of agreements; and therefore, unless the paper in question came within the definitions of the statute, as an agreement or memorandum of agreement, it would not require a stamp. Now, on the 15th *March*, the parties having met and talked over the subject, they came to no agreement; but *Leggott* says to the plaintiff, "Put down your proposal in writing," which he did accordingly, but nothing further was done. At the subsequent meeting all that passed was in parol, and then it was agreed that *Leggott* should take the land according to the terms of an abandoned agreement between him and *Grant*, which agreement was stamped. The paper therefore which was written by the plaintiff had nothing to do with the subsequent agreement. At the utmost it was a mere proposal, and certainly did not amount to an agreement, or a memorandum of an agreement. In that point of view I am clearly of opinion that if it was of any weight in the cause, it was admissible without a stamp.

HOLROYD, J.—I am also of opinion that this paper did not require a stamp. It is not every writing given in evidence to support an agreement that requires a stamp. The paper itself must be an agreement, or minute or memorandum of an agreement. This paper was simply a proposal, which was afterwards to be the subject of further consideration. If indeed it had been accepted in writing, it might have required a stamp, but nakedly it could only be treated as parol evidence of the contract. In that sense it was properly admitted without a stamp (*a*).

Rule discharged (*b*).

(*a*) *Littledale*, J. was absent.

(*b*) Vide *Hawkins* v. *Warre*, ante, 512; *Dalison* v. *Stark*, 4 Esp. 163; and *Doe* v. *Cartwright*, 3 B. & A. 326.

1825.

Wednesday, February 9.

The KING *v.* The Justices of HUNTINGDONSHIRE.

The 5th sect. of the malicious trespass act, 1 *G.* 4. c. 56. gives an appeal to the sessions, on condition that the party shall give "*immediate notice* of such appeal and of the matters thereof," &c.:—Held, that a notice of appeal seven days after a conviction on this statute, was insufficient to give the sessions jurisdiction.

ON shewing cause against a rule nisi for a mandamus to the justices of *Huntingdonshire*, commanding them to enter continuances and hear an appeal at the next general quarter-sessions against a conviction on the malicious trespass act, 1 *Geo.* 4. c. 56, the facts disclosed on affidavits were to the following effect:—On the 11th *September* the appellant was convicted by one justice, of a malicious trespass to land, and adjudged to pay one penny for the damages and ten shillings costs. On the 14th the appellant applied verbally by his attorney for a copy of the conviction, but it was refused by the justice. On the 18th he made a written application to the same effect, but it was not granted, and on that day he paid the money under the assurance of the magistrate that it would not prejudice the merits of the case if he chose to appeal, and he then for the first time served the justice with notice of appeal, and entered into the recognizances required by the statute for prosecuting his appeal at the sessions with effect. The sessions dismissed the appeal, on the ground that, the damages and costs having been paid, the appellant was concluded.

Scarlett and *Dover* now shewed cause, and in answer to the application relied upon the fact appearing upon the affidavits, that no notice of appeal had been given until seven days after the conviction, which they contended was too late, the 5th section requiring that the notice should be given *immediately:* upon this point they rested, without referring to any others.

Patteson, contrà, insisted that this being a penal statute ought to be construed liberally in favour of the subject. If the word "immediate" were to be construed strictly, it might mean the very moment the justice decided the case,

or before the party quitted the justice room; but this could not be the intention of the legislature. An ignorant man, upon being convicted on this statute, might not be aware, until long after the conviction took place, that he had a right of appeal; but was he to be concluded, because on the instant he did not give a notice, (which must be in writing,) stating the matters of the appeal? Although the justices could not assess damages beyond £5, yet it might happen that the party would not have money enough about him, and was he to forfeit his right of appeal because he could not raise it time enough to enable him to avoid going to prison? The statute surely ought not to receive so narrow a construction.

Abbott, C. J.—The right of appeal is given by the 5th section of this statute, on condition of the party's "giving *immediate* notice of such appeal and of the matters thereof, and finding sufficient security, to the satisfaction of such justice, for prosecuting the said appeal with effect, and abiding the determination of the Court therein." It is not necessary in this case to decide whether the words "immediate notice" are to be construed so strictly as to require that the notice should be given before the party quits the justice's room upon the determination of the complaint. But they must mean prompt and expeditious notice,—and a notice with reference to the *merits* of the case. I am far from thinking that that which took place in the seven days' interval between the judgment of the justice and the giving notice entitles this party to much favour. It shews the importance of requiring that the notice of appeal should be given early; for it is manifest that his wanting a copy of the conviction was for the purpose of enabling him, with the aid of his attorney, to pick holes and find out faults in mere matters of form. Every body knows that convictions are not drawn up on the instant. Drawing up the conviction is done afterwards and cannot be expected to be done immediately. I think the justices at sessions ought to have dis-

1825.

The King v. The Justices of Huntingdonshire.

missed this appeal for want of due notice. They, it seems, have dismissed it on another ground; nevertheless, we ought not to send it down to be reheard, if we are of opinion, as we certainly are, that this party was in no condition to appeal, although their decision was not on that point. I am clearly of opinion that this rule ought to be discharged. It is much to be lamented that, for the sake of ten shillings, a party should go on at so great an expense of litigation; for whatever might be the result, it must be considerable to himself even if he succeeded.

Holroyd, J. and Littledale, J. concurred (a).

Rule discharged.

(a) *Bayley*, J. was absent.

The King v. The Mayor, &c. of West Looe.

Wednesday, February 9.

An inhabitant of a borough is not, by force of his inhabitancy, entitled to be a corporator; therefore, where the inhabitant of a borough applied for a mandamus to be enrolled and sworn a corporator, but did not shew an inchoate right in the inhabitants to be corporators, the Court refused the writ.

THIS was a rule calling on the mayor and steward of the borough of *West Looe* to shew cause why a writ of mandamus should not issue, directed to them, or other proper officer in that behalf, commanding them, at the next court-leet to be holden for the said borough, to enrol and swear *Robert Reath* as a resiant and burgess of the said borough. The affidavits upon which the rule was obtained set forth the following facts: *Robert Reath* is an inhabitant householder in the borough, and has applied at the court-leet to be enrolled and sworn as a resiant and burgess, but has been refused. In the reign of *Edward* 2. a charter was granted to the borough, which recited and confirmed a former charter, by which *Richard* Earl of *Poictou* and *Cornwall* granted to *Odo de Freverbyn* that his borough of *Portbyan*, otherwise *West Looe*, should be a free borough, and that the burgesses of the same borough should be free

and quit of all customs. Also, if any one should reside for a year and a day in the same borough without just claim, he should, according to the law of other free burgesses, be quit of all neifty and servitude. In the 16th year of the reign of *Elizabeth*, another charter was granted to the borough, which recited that *Portbyan*, otherwise *West Looe*, was an ancient town, and that the burgesses and inhabitants had immemorially enjoyed several franchises, as well by prescription as by charters theretofore granted to the tenants and inhabitants of the town, and that the town was brought to great decay by reason of the poverty of the inhabitants, and that divers of the inhabitants had petitioned her majesty to make the same inhabitants a body corporate; and granted, that the said borough should thenceforth be a free borough corporate of one mayor and burgesses, being inhabitants of the town aforesaid. It then provided that there should be twelve capital burgesses, who were to be the common council, and to make bye-laws, &c.; and that in case of the death of any capital burgess, a new one should be elected within eight days by the mayor and capital burgesses: and it then gave them a court-leet to be holden twice in every year, at *Easter* and *Michaelmas*. There are no books of record of the borough extant of an earlier date than 1607, but there are books in regular succession from that year to the present, excepting one interval from 1623 to 1641, and those books contain entries of the proceedings of all the borough and leet courts held from time to time, of the elections and swearings of the mayors, and of the elections, swearings, and removals of the capital burgesses, &c.: and of the swearings of the freemen upon their being entered on the resiant roll, of the lists of the jurors, of some few bye-laws, and of all the other corporate transactions. In these books there are lists, most of them annual, of the persons from time to time forming the corporation, which lists form part of the proceedings of the leet or law courts, and are thus placed in the books:

1825. The KING v. The MAYOR of WEST LOOE.

From 1607 to 1624. Free tenants, residents, capital burgesses.

1641. Free tenants, capital burgesses, resiants.

1645. Free tenants, capital burgesses, sensores.

1649. Capital burgesses, free tenants, resiants.

1651 to 1660. Capital burgesses, free tenants, freemen.

1660 to 1672. Capital burgesses, free tenants, resiants.

1672. Capital burgesses, free tenants, conventionary tenants.

1675 to 1678. Capital burgesses, free tenants, conventionary tenants or resiants.

1678. Capital burgesses, free tenants, conventionary tenants, vel ~~resiants~~ tenentes.

The line drawn through the word resiants and the word tenentes are in a paler ink, and appear to have been written subsequent to the rest of the entry.

1679. Capital burgesses, free tenants, free burgesses.

From that period the lists continue in this latter form. By the parish registers and corporation records it appears that the persons whose names are contained in these lists, named residents, resiants, sensores, freemen and conventionary tenants, vel resiants, were all inhabitants of the borough previous to 1676. At the court-leet held in *October*, 1676, the names of certain persons, not habitants of the borough, were added to the bottom of the resiant list, with the words "admitted, Jurat. liber." affixed; such list being there styled the list of "conven. tenentes vel resiants." No other mention whatever was made in the records of those non-resident persons than the mere entry of their names on the resiant roll, although they thenceforth exercised the rights and privileges of freemen or burgesses, together with the other resiants, by signing subsequent returns of members of parliament. In *May*, 1679, all the persons who were named in the last list of resiants are found in the same successive order in a list then styled "free burgesses," which stands in the said book in the place where the

1825.
The KING v. The MAYOR of WEST LOOE.

resiant list always previously stood; the name "free burgesses" being then given to the same persons instead of "resiants." Many persons, whose names appeared on the resiant list, joined in the elections of mayors, and occasionally in those of members of parliament; no person ever joined in any such election till after his name had appeared in that list: and there does not appear to have been any other method of making free burgesses, except entering their names on the resiant list. The affidavits produced upon shewing cause against the rule, stated, that so far back as living memory extended, the usage had been for the mayor and capital burgesses to meet together on particular days and elect free burgesses; that there was no tradition in the borough of any other method of making free burgesses; that the ancient books of the corporation did not contain any entries, except those above-mentioned, of any elections, either of free burgesses, or capital burgesses; and that from 1714 to the present time, the mayor and capital burgesses only had invariably elected the members of parliament for the borough.

Adam and *Coleridge* shewed cause. Before the Court can grant this application they must be satisfied that all the inhabitants of the borough of *West Looe*, upon being presented and sworn at the court-leet become by right, and are ipso facto members of the corporation. Now there are two conclusive answers to that proposition; first, that the inhabitants of a town cannot by law be incorporated; and second, that the being presented and sworn at a court-leet cannot confer any right of admission to a corporate office. Without, however, relying on these, the affidavits do not support the rule, for they do not shew any existing usage in the borough by which the present applicant is entitled even to be presented and sworn at the court-leet. The charter of *Elizabeth* grants that the mayor and burgesses shall be a body corporate, but it no where incorporates the inhabitants; and even if it did, it could extend to those only who were

1825.

The King v. The Mayor of West Looe.

inhabitants at the time it bore date. When the king incorporates the inhabitants of a town, he does not thereby confer upon every man who may thereafter come into the town the right of being a corporator; he appoints the original corporators by name, and if the body is to be perpetual, it must be perpetuated by some mode prescribed either in the charter or in a bye-law, which every corporation has a power of making, incident to their corporate character; *Bro. Abr. Corporation*, Pl. 65. If, indeed, this applicant had shewn an inchoate right to become a member of the corporation, the Court would have interfered to aid him, because wherever a party has an inchoate right, as by birth, or apprenticeship, or marriage, this Court will grant their writ of mandamus to enforce the completion of that right; *Rex* v. *the College of Physicians* (*a*); but he has shewn no such right. Neither does it appear upon these affidavits what connection there is between the court-leet and the corporation, nor how the admission at the one will affect the applicant's rights in the other. It will be contended in support of the rule that as some of the inhabitants whose names appeared upon the resiant lists did in fact vote at elections, therefore, every inhabitant by having his name entered on that list acquired a right so to vote, and became to all intents and purposes a corporator. But the premises do not justify the conclusion, for unless it is satisfactorily shewn that all the inhabitants are corporators, and how they became so, the mere allegation that some of them did certain acts in the character of corporators carries no conviction with it; for though inhabitancy is one ingredient in the corporate character, there are others without which it is not complete. It is sworn, moreover, that the court-leet and court-baron are constantly held together, and which of those courts the persons named in the resiant lists attended, or for what purpose, or in what character they attended, is left wholly unexplained. It is, indeed, also sworn, and the point will doubtless be much relied on by the other side, that the

(*a*) 4 Burr. 2186.

corporation books contain no entries of any elections of free burgesses; but it is observable that they also contain no entries of any elections of capital burgesses, and as the latter must necessarily have taken place, the fact, taken altogether, becomes unimportant. With respect to usage, the whole argument is strongly in opposition to the rule, for the only usage at all clearly proved is that with respect to the elections of members of parliament, which it is distinctly sworn have, from the year 1714 down to the present time, invariably been made by the mayor and capital burgesses only.

Copley, A.G. and *Merewether*, contrà. The real question in this case is, who were the burgesses by prescription in this borough. That there were burgesses by prescription there is no doubt, because they are mentioned in the charter of *Elizabeth*, though the mode of their creation is not there pointed out. It also appears by that charter, that former charters had incorporated the inhabitants, therefore the only question is who are, in the legal meaning of the word, the inhabitants of this borough. Now no man is an inhabitant, in the legal sense of the word, unless he is, liber homo, a freeman, that is, a householder who has taken the oaths of allegiance at the court-leet; for until he has been sworn at the court-leet, he is not legalis homo, and therefore not entitled to the name or privileges of an inhabitant. Then, when a man has been sworn at the court-leet and become legalis homo, and is also a householder, if the town in which he lives be an incorporation of the inhabitants, he being thus one of the inhabitants, becomes ipso facto one of the corporators also. Now it is quite clear that this borough is an incorporation of the inhabitants. The affidavits shew by very ancient usage, that the inhabitants were the persons from time to time incorporated, for they set out the lists extracted from the corporation books, which shew that from 1607 to 1624 the corporate body consisted of free tenants, residents and capital burgesses; and that from 1624

1825.

The King v. The Mayor of West Looe.

to 1678 resiants, and resiants only, though under various denominations, constituted one list of corporators, till, in 1679, the term free burgesses was substituted for resiants, and in that shape the lists have continued ever since. They shew further, that immediately upon their names being entered upon these lists, and their being thenceforth sworn, these persons received and exercised all the rights and privileges of free burgesses, taking part in elections both of mayors and members of parliament; that such entry and swearing was their only qualification; and that without that they were never allowed to act in any manner as free burgesses. Then this borough being an incorporation of inhabitants, and this applicant being an inhabitant householder, he is de jure a corporator, and has a right to call upon this Court to compel the proper officers to enrol and swear him as such, without which his title cannot de facto be complete. This is a question of immense public importance, affecting not only the borough of *West Looe*, but almost every corporation in the kingdom; for the right claimed in this particular case will upon proper investigation be found to belong to the inhabitants of every corporate town. Then where the question before the Court involves matter of public right, the writ of mandamus is a writ of right, and may be so demanded. It is also the long established practice of the Court, where there are conflicting affidavits upon matters of fact, to make the rule absolute, and thus submit the evidence to the consideration of the only proper and constitutional tribunal, a jury; and where the law resulting from the facts, or from the documents, is attended with doubt or difficulty, they always adopt the same course, in order to give the applicant the opportunity of raising the question upon the record. On all these grounds it is confidently submitted that this applicant is entitled to have this rule made absolute. With respect to the usage relied upon by the other side, it is a perfect nullity, for part of that usage was for non-residents to vote at the election for members of parliament; and the late decision of the committee of the

House of Commons on a case arising out of this very borough has declared that usage to be illegal.

Abbott, C. J.—I am of opinion that in the present case we ought not to grant the writ prayed for. We are desired to grant a writ of mandamus directed to the mayor and steward of the borough of *West Looe*, or other proper officer in that behalf, commanding them at the next court-leet to be holden for the borough to enrol and swear *Robert Reath* as a resiant or burgess of the borough. Now if it had appeared upon the affidavits before us, that a resiant, when enrolled and sworn as such, without reference to any other character, was entitled to the privilege of voting at the election of members of parliament, I should have thought that we ought to grant the writ, because we are bound to give to every person the power of exercising that valuable franchise, if he shews us that he fills a character which entitles him to it. But it is conceded that a committee of the House of Commons, which is competent to give the law to this Court on this particular subject, has decided that the right of voting is in the members of the corporation, being also inhabitants of the town, and in such only. There is no reason therefore for granting a writ commanding that *Robert Reath* shall be enrolled *resiant*, and that brings me to the second, and indeed the only real question in this case, namely, whether upon these affidavits he has shewn any right to be enrolled a *burgess* of this borough. Now it has been contended, partly upon the language of the charters and partly upon the usage which appears to have prevailed in this borough, that every householder resiant has a right to have his name enrolled at the court-leet as a resiant and a member of the corporation. It is said that inhabitancy confers this right, though it is at the same time contended that the right is confined to householders. If inhabitancy does confer the right, why is it to be so confined? This charter is in language similar to many others. Whether it was wise or not to grant such charters, it is equally out of

1825.

The King v. The Mayor of West Looe.

the range of our duty and our authority to enquire; our duty is to interpret them, and to interpret them according to the decisions of our predecessors, by whom we are to be guided. No instance has been laid before us of a corporation in which the mere character of inhabitant, or even of inhabitant householder, conferred the right to be a member of the corporation; nor do I believe that any such instance exists. An inchoate right to become a member of a corporation may be acquired by several well known means, as by birth, servitude, or marriage; and when such a right has been so acquired, this Court will interfere to see it perfected. But an inchoate right to become a member of a corporation resting solely on the character of inhabitant, or inhabitant householder, is something perfectly new. This charter certainly confers no such right, and if we were to grant this writ, we should be establishing a precedent that might have consequences the extent of which it is impossible to foresee, and should be usurping an authority which the law has not vested in us, an authority to prescribe for the rule and government of a great portion of the corporations in the kingdom. Then, if the charter does not confer the right contended for, it remains only to see whether the usage does. The usage is certainly very obscure:—how much of it has proceeded from usurpation, how much from ignorance, and how much from concession, it is impossible upon these affidavits to say; but certainly the affidavits do not disclose any thing like an established usage for every resident householder to be enrolled and sworn a corporator. There appears to have been great ignorance and great neglect on the part of the corporation, both in keeping their books and in filling up their body; but it does appear that there are recorded instances of the election of members of the corporation; and it may be that the corporation, when they come to be better informed of their situation, may think proper to exercise the power of election more regularly, which is incident to them as a body corporate, and which they must have, in order to keep the corporation alive

and to give it perpetual succession, if no other mode is pointed out by the charter. There is, however, no usage shewn to have existed either before or after the charter of *Elizabeth*, nor does it appear that this was a corporation before that time, although it was a borough. The usage, such as it is, certainly does not warrant us in saying that every inhabitant householder has a right to be sworn a corporator; and we ought to find a very clear and cogent usage to that extent, before we interpose our authority for the purpose of giving to this corporation a character and constitution equally unknown to the law of the land and to our own practice and experience. Much of the argument that has been addressed to us might with more propriety have been applied to the question, whether or no resiancy confers a right of voting at the election of members of parliament, and that is a question which we have no authority to decide; upon that point we must take the law upon the decision of the House of Commons. I am, therefore, of opinion, that this rule ought to be discharged.

Bayley, J.—I agree that wherever there is fair doubt upon either matter of fact or matter of law, this writ ought to be granted; but it is also the duty of the Court to be satisfied that there is such doubt before they grant an application like the present, the effect of doing which would probably be to disturb almost every corporation in the kingdom. The form of this rule is very confused, and I am inclined to think that it is intentionally so. It is for a mandamus addressed to persons who fill different characters, and it leaves it in doubt in which of those characters it calls upon them to act. It appears from the charter that the mayor and steward of the borough are also officers of the court-leet, and whether this mandamus is meant to apply to them as officers of the court, or as officers of the corporation, the rule does not distinctly express. It therefore becomes necessary to consider the question as affecting them in each capacity. They are required to enrol and

1825.

The King v. The Mayor of West Looe.

swear a person a resiant or burgess. Now will such a mandamus lie to them as officers of the court-leet? I think clearly not. The court-leet does not appear to be the place at which the business of the corporation is, or of necessity ought to be, transacted. It may, occasionally, for the convenience of all parties and by common arrangement, be transacted at the time and place of holding the court-leet, but the charter does not direct that any of the proceedings of the corporation shall be carried on there, nor does there seem to be any natural or necessary connexion between the one and the other. There are some of the corporation affairs which it would be impossible to transact at the court-leet. For instance, if a capital burgess dies, or is removed, another is to be elected within eight days whether there be a court-leet holden within that period or not, and other instances might be mentioned. If the present applicant wishes merely to be sworn at the court-leet, for any purposes connected with that court, he has only to attend there and demand the oath of allegiance to be administered to him, and his request will probably be at once complied with; but until he has attended and made that demand and been refused, we certainly cannot grant a mandamus on that ground. But it is said that this person has rights under the charter granted to the corporation, and that there is a connexion between those persons who are enrolled at the court-leet and those who are members of the corporation, and that, therefore, because he has a right to be enrolled at the court-leet, he has also a right to be sworn a member of the corporation. Then, if this mandamus is to be considered as addressed to the mayor and steward in their character of officers of the corporation, it becomes necessary to enquire whether he really has any such right, which will depend upon the language of the charter. Now, the charter of *Elizabeth* recites a petition from divers of the queen's subjects, inhabitants of the borough, that the inhabitants may be created a body politic and corporate. Whether that petition came from the whole or only from a

part of the inhabitants, does not appear, nor is it material to enquire. The charter then proceeds to grant that the town of *Portbyan*, otherwise *West Looe*, shall be a free borough corporate, to consist of one mayor and burgesses, being inhabitants of the town. It does not, as was assumed in argument, state that *all* the inhabitants shall be burgesses; it provides for the election of the mayor and of twelve capital burgesses: but it says nothing as to common burgesses. What is the effect of that? Suppose the legal effect of this charter to have been, to make every inhabitant of the place in the first instance a member of the corporation, (which, however, I take not to have been its legal effect,) still that would not make all persons who thereafter might become inhabitants of the place, members of the corporation also. I take the law in that respect to be perfectly clear, that a man does not become a member of a corporation merely by residing within a borough; but that every corporation has an incidental right to keep itself alive, and that where no mode is pointed out by the charter for that purpose, it may make regulations of its own, and may lawfully fill up the vacancies in its own body by the means of election of new members. For these reasons it appears to me that this applicant has not made out a primâ facie case, and has failed to shew any such reasonable doubt either as to the facts or the law of the case, as would justify us in granting this writ. The rolls containing the lists of persons who have from time to time attended the court-leet, have been relied upon in support of this rule, but I have no difficulty in saying that in my opinion those lists have no sort of connexion with corporation purposes; and the probability is that they existed long before the date of the charter, and that they were made exclusively for the purposes of the court-leet. Then it is suggested, that in this view of the case, the corporation will be at liberty to elect residents or non-residents at their own pleasure, which will be contrary to the decision of the House of Commons upon that subject; but I apprehend they will have no such

1825.
The King v. The Mayor of West Looe.

power, for the charter, containing the words "burgesses *being inhabitants*," seems clearly to impose the qualification of inhabitancy. For these reasons it appears to me that it is our duty to discharge this rule.

Holroyd, J.—I was not present during the whole of the discussion of this case, and therefore I shall not go into argument upon it; but, so far as I have heard the case, I am of the same opinion with the rest of the Court.

Littledale, J.—I am of the same opinion.

Rule discharged.

Thursday, February 10.

The King v. Wilson, and others.

Mandamus will not lie to churchwardens to *make* a rate.

ON a former day a rule was obtained calling on the churchwardens of the parish of —— in the county of *Cambridge*, to shew cause why a mandamus should not issue to them commanding them to *make a rate* for the repairs of a donative church in that parish.

Scarlett now shewed cause and objected, preliminarily, that a mandamus would not lie to the churchwardens to *make a rate*. All that they could be required to do was, to call a meeting of the parishioners for the purpose of considering the propriety of making a rate. The churchwardens had not power to make a rate without the sanction of the vestry. He cited *Rex* v. *the Bishop of Chester* (*a*) and *Rex* v. *St. Margaret* (*b*).

Denman, C. S. contrà, admitted the force of the objection.

Per Curiam.—You cannot call upon the churchwardens to make a rate. You can only call upon them to hold a vestry meeting for that purpose.

Rule discharged.

(*a*) 1 T. R. 396. (*b*) 4 M. and S. 250. See 5 T. R. 364.

1825.

STONEHOUSE, Assignee of HARRISON, a Bankrupt, *v.* READ.

Thursday, February 10.

A., an agent, held funds belonging to *B.*, his principal, but had accepted bills drawn by *B.* to the full amount of them. *B.* paid away the bills to his creditors, who, to relieve *A.* from liability, and without the knowledge of *B.*, accepted from *A.* a composition of 10*s.* in the pound, and gave him up the bills; *A.* then holding funds belonging to *B.* to the full amount of the bills. *B.* afterwards became bankrupt, and his assignees brought assumpsit for money had and received against *A.* for the difference between the amount of the bills and the composition:—Held, that as *B.* had been benefited to the full amount of the bills, the payment of the composition was, as between him and *A.*, a full payment of the bills, and, therefore, that the action was not maintainable.

DECLARATION in assumpsit, for money had and received, and upon an account stated. Plea, the general issue. At the trial before *Abbott*, C. J., at the *London* Adjourned Sittings after *Michaelmas* Term, 1823, the plaintiff had a verdict, damages 4000*l.*, subject to the award of a gentleman at the bar, who was by the terms of the reference empowered to take all accounts between the parties, and to state upon the face of his award any point of law that either party should require. The award found that upon a balance of all accounts between the parties, the defendant was indebted to the plaintiff, as assignee, in the sum of 1,772*l.* 13*s.* It directed that the defendant should pay to the plaintiff that sum, and should also forthwith deliver up to the plaintiff a bill of exchange, drawn by the defendant upon and accepted by the bankrupt, for the sum of 1,334*l.* 12*s.* It then stated the following facts:—It was proved before the arbitrator, that previous to *Harrison's* bankruptcy, the defendant had accepted bills to a large amount, drawn upon him by *Harrison*, which bills had been paid away to *Harrison's* creditors. At the time of accepting those bills, the defendant, as the agent of *Harrison*, held money belonging to *Harrison* fully equal to the amount of the bills, which money was not withdrawn from his custody before the bankruptcy of *Harrison*. After the bills became respectively due, but before the act of bankruptcy upon which *Harrison* was made a bankrupt, the holders of the bills, *for the purpose of relieving the defendant from his liability to them*, accepted from him a composition upon the bills, and delivered up the bills to him. *Harrison* was no party to this arrangement. The award then concluded by stating

1825.

STONEHOUSE v. READ.

that the arbitrator, upon taking the accounts between the parties, was of opinion that the defendant ought not to be allowed to set off the full amount of the bills, but only the amount of the composition, and that he had in his award allowed the defendant the amount of the composition which it appeared he had paid; but that if the defendant was entitled in point of law to charge the full amount of the bills, either against his principal, the bankrupt, or the plaintiff as assignee, then the balance would be in his favour. A rule nisi having been granted, to enter either a verdict for the defendant, or judgment of nonsuit,

Marryat and *Comyn* now shewed cause. The defendant stands before the Court either as acceptor of the bills, or as agent of the bankrupt. If he be considered as acceptor of the bills, he is in the nature of a surety, and in that capacity he has no right to charge his principal with more than he has actually paid; *Toussaint* v. *Martinant* (a). Again, if he be considered as agent of the bankrupt, he cannot in that character charge his principal with more than he has actually paid; for, as agent, he was bound to do the best he honestly could for the interests of his principal, and, having paid off the creditors with a composition when he had funds to the full amount of their claims, he could hold the balance only for the account of his principal, whose representative the plaintiff is. [*Bayley*, J. The probability is that the bill holders consented to accept the composition under the belief that the defendant had no funds of the bankrupt in his hands. If so, when it turned out that he had funds, and to the full amount of the bills, the bill holders were entitled to treat the composition as a nullity, and to call upon him for the balance. Then, if the bill holders are the persons entitled to this money, it follows that neither the defendant nor the bankrupt have any title to it, and then this action is not maintainable.] The defendant claims to retain, as against the bankrupt, a sum of money beyond that

(a) 2 T. R. 100.

which he has paid. He is endeavouring, therefore, to convert himself into a purchaser of the debt; and that he has no right to do, because all that he has paid, he has paid not out of his own funds, but out of those belonging to the bankrupt. The benefit, therefore, arising out of the composition, belongs, both in law and equity, to the bankrupt, and not to the defendant; and the plaintiff, as the assignee of the bankrupt, and a bonâ fide creditor, ought to recover the balance in this action. [*Bayley*, J. The bankrupt has had all the benefit that he could have had from an actual payment to the bill holders of 20*s*. in the pound.] That does not distinctly appear upon the face of the award, and the Court will not presume it, to defeat the claim of a bonâ fide creditor.

Scarlett, (with whom were *Gurney* and *Brodrick*,) contrà. The award finds that if the bills had been paid in full, the balance of accounts would have been in the defendant's favour. The defendant, therefore, was the commercial agent of the bankrupt, having funds belonging to his principal in his hands, but having accepted bills to more than the amount of those funds; so that he had a legal title to the amount of those funds, because the acceptance of a bill, unless it is afterwards dishonoured by the acceptor and taken up by the drawer, amounts in law to payment of the debt. The bankrupt, on the other hand, had no longer any claim on those funds, because he had paid his creditors with the bills, and had thus received full value for them. Then, what was the object of the composition? It was accepted, not to benefit the bankrupt, but to benefit the defendant, and if the bankrupt can call upon the defendant to pay over to him the difference between the composition and the full amount of the bills, that object will be entirely defeated. It is a general rule of law, that if the holder of a bill gives time to the acceptor, without the knowledge and consent of the drawer, the drawer is discharged. Here, the holders of the bills accepted the composition from the defendant

1825.
STONEHOUSE v. READ.

without the knowledge or consent of the bankrupt, the bankrupt therefore is discharged; and having had full value once for the bills, and being released from all liability in respect of them, neither he nor his assignee can have any claim upon the defendant. Suppose the bankrupt had not been discharged, and the composition had been made with his knowledge and consent; then he would have been liable to the holders for the difference between the composition and the full amount of the bills, and if he had paid it, he would have been entitled to recover it back from the defendant; but, in the absence of those facts, he is not so entitled, and yet it is contended that he has the same claim now, as if he had actually paid the money. The composition was acepted for the relief of the defendant, and the legal effect of it is, that the defendant has paid to the holders the full amount of the bills, and that the holders have returned to the defendant, by way of gift, the difference between that amount and the amount of the composition; and with that arrangement the bankrupt has nothing to do, for he is in the same situation as if the bills had really been paid in full. [*Holroyd*, J. If it can be considered, as a legal result, that there has been an actual payment by the acceptor of the full amount of the bills, and a gift of a part back by the holder; then, undoubtedly, the defendant is entitled to charge the bankrupt's estate with the entire sum so paid. But if not, and if it is to be taken that the acceptor has never paid the whole, I have great difficulty in saying, that the defendant is entitled to charge any more than he has actually paid. The award finds that if the whole had been paid, the balance of accounts would have been in the defendant's favour; now, if *Harrison* had not become a bankrupt, could the defendant, having paid only the composition, have maintained an action against him for that balance? There is no doubt, that if he had paid the whole, and there had been a balance due to him, he might have maintained such an action, but in the present state of facts, would not proof of the payment of the composition have

been an answer?] He might well maintain such an action in the present state of facts, because, quoad the bankrupt at least, there was a payment of the full amount. [Here the Court stopped him.]

1825.
STONEHOUSE v. READ.

ABBOTT, C. J.—I am by no means surprised that the learned arbitrator should have arrived at the conclusion of law from the facts proved before him, which it appears by his award he has done; for I was of opinion for some time after I had perused the award, that he had arrived at the right conclusion in point of law. Upon consideration, however, I have been induced to change my opinion, and it now appears to me, that that conclusion is erroneous, and that this award must be set aside. The short and simple ground upon which I found my judgment is, that the bankrupt and his assignee have already had the full and complete benefit of the bills accepted by the defendant; and having had that, it seems to me, that they are entitled to no more. I am, therefore, of opinion, that this action is not maintainable, and that judgment of nonsuit must be entered.

BAYLEY, J.—In the early part of this discussion, I was impressed with the same view of the case as my Lord Chief Justice; but, in the progress of the argument, I have been led entirely to change my opinion. I certainly thought for some time, that, as against the principal, the defendant, as an agent, could not be entitled to set off any more than he had actually paid; and if the composition had been entered into for the benefit of the bankrupt, and not, as it clearly was, for the benefit of the defendant, I should have continued of the same opinion still. Now, the composition may have been entered into fairly, or unfairly, and I shall shortly consider it in both points of view. If it was entered into fairly, and after a full communication by the defendant to all the bill holders of his precise and real situation, then it is quite clear that their object must have been to relieve him, and him only. The effect would be, that they would

1825. Stonehouse v. Read.

accept 10s. in the pound from him, upon a private understanding, that the bankrupt was to be discharged altogether, which would be as between the bill holders and the bankrupt, a payment of 20s. in the pound. But it must also have been intended, that the payment of 10s. in the pound should be a complete discharge to the defendant, because if the defendant was to remain liable to the bankrupt for the other 10s. in the pound, the benefit arising out of the arrangement would attach, not to the defendant, but to the bankrupt. The only losers in that case would be the bill holders, for they would get only 10s. in the pound, while the defendant would pay only 10s. in the pound, and the bankrupt would be relieved from paying 20s. in the pound, to which he was liable as drawer, and would, besides, be entitled to claim 10s. in the pound from the defendant. But, supposing the composition was entered into unfairly, and without any communication to the bill holders of the defendant's real situation, still it cannot alter the case as between him and the bankrupt. The composition may have been a fraud upon the bill holders. If so, they are reinvested with their original rights; they are no longer bound by their acceptance of the composition; they are entitled to call upon the defendant for the remaining moiety of their debts; and if they are entitled so to call upon the defendant, he is entitled to retain the money in his hands to answer that call.

Holroyd, J.—The award states, that the composition was accepted by the bill holders for the purpose of relieving the defendant from his liability as acceptor of the bills, and there can be no doubt that he paid the composition with the same view. The arrangement was evidently made for the benefit, not of the bankrupt, but the defendant; but, though the bankrupt has been benefited to the full amount of the bills, still, as the defendant has not actually paid to the full amount of the funds he held, unless the transaction can be considered as if he had paid the whole, and the bill

1825.
STONEHOUSE v. READ.

holders had returned him a moiety as a gift, I still feel great difficulty in saying, that the defendant is entitled to set off the full amount of the bills. Upon the whole, however, I think it may be so considered. I think the creditors by agreeing to take 10s. in the pound in lieu of their entire debt, and giving up the bills to the acceptor, did make the transaction in its legal effect the same as if they had actually received the whole, and returned a half. I think it was, in point of law, a payment in full, and that it would have given the defendant a right of action against the bankrupt, if the amount of the bills had exceeded the amount of the funds which he held as his agent. Generally speaking, the acceptor of a bill, which he has paid, can recover from the drawer only the exact sum which he has paid on his account; but, still, if this was in law a payment of the whole amount of the bills, and a return by way of gift of the moiety, it is the case of an acceptor who has paid a bill in full, and is therefore entitled to charge the full amount against the drawer. Upon the whole, therefore, I agree, that this action is not maintainable.

Rule absolute to enter a nonsuit (*a*).

(*a*) *Littledale*, J. was absent.

MARTIN *v.* MAHONY.

Thursday, February 10.

The defendant having eight days to appear to non-bailable process, his attorney indorsed the writ with an undertaking to appear, but before the time for appearance had expired, plaintiff's attorney demanded a plea, and no appearance being afterwards entered, he signed judgment, which was held irregular, and set aside, but without costs.

ON shewing cause against a rule nisi for setting aside the judgment which had been signed in this case as for want of a plea, the facts were these: The defendant's attorney having been served with non-bailable process, returnable in eight days, indorsed on the writ an undertaking to appear for the defendant. The time for appearance would not expire until the 30th *November*, but before that time the plaintiff's attorney demanded a plea, without ascertaining whether, in fact, an appearance had been entered. Upon afterwards

1825.
MARTIN v. MAHONY.

discovering that an appearance had not been entered, within the eight days, he signed judgment, and the question was, whether the judgment was regular.

ABBOTT, C. J.—We think the judgment was irregular. The defendant had eight days to appear in. They did not expire until the 30th *November*, and regularly the plaintiff's attorney could not demand a plea until there was an appearance in fact entered, whereas, the plea is demanded before appearance, and before the time for appearing has expired. No doubt the plea was demanded upon the faith that that which the defendant's attorney had undertaken to do, would have been done; but still we think the demand of plea was premature, and therefore the plaintiff had no right to sign judgment. The judgment must be set aside, but without costs.

Rule absolute without costs.

Scarlett, *Gurney* and *Comyn* for the plaintiff; *J. Evans* for the defendant.

Thursday, February 10.

Habeas corpus refused, to discharge an apprentice from a king's ship, where the apprentice did not allege that he was detained against his own consent. The master, however, may have a warrant to the commander of the vessel to have the apprentice discharged.

Exparte GROCOT.

WIGHTMAN moved for a writ of habeas corpus to the commander of His Majesty's ship *Britannia* to bring up the body of *John Grocot*, an apprentice, detained on board the said ship for the purpose of serving in the navy. The application was made at the instance of the master. [*Abbott*, C. J. Does the apprentice say that he is detained against his consent?] There is no affidavit to that effect.

ABBOTT, C. J.—Then non liquet the apprentice may not have voluntarily entered himself as a seaman, and may not wish to come back again. We never grant a habeas corpus where the party does not say that he is detained against his

1825.

Exparte GROCOT.

own consent. You must apply to a judge at chambers for a warrant at the instance of the master, and have the lad discharged in that way.

PER CURIAM.

Writ refused.

The KING *v.* SAUNDERS and others.

Thursday, February 10.

The stat. 30 *G.* 2. c. 24. s. 20, takes away the writ of certiorari; but where counts on that statute were joined with counts for a conspiracy at common law to obtain goods by false pretences:—Held, that the certiorari was not taken away.

INDICTMENT at common law against the defendant for a conspiracy to obtain goods by means of false pretences, with counts on the statute of 30 *Geo.* 2. c. 24. for obtaining goods under false pretences. The indictment having been found by the grand jury for the county of *Middlesex*, a rule nisi was obtained on a former day for removing the indictment by certiorari into this Court.

Andrews now shewed cause against the rule, and contended, that as the indictment contained counts on the 30 *G.* 2. c. 24. it could not be removed into this Court, for by sect. 20 of that statute it is declared, that no certiorari shall be granted to remove any indictment, conviction or other proceeding had thereon in pursuance of this act (*a*).

Chitty, contrà. The 20th section of the statute in question does not come into operation where there are counts at common law joined with counts on the statute. If it did, it would always be in the power of prosecutors to deprive a defendant of the benefit of a certiorari in the most important cases, by introducing a count on the statute, upon which they might not intend to offer any evidence. In the crown office there is a memorandum of a case decidedly in point on this question; *Rex* v. *Vaux* and others. On the hearing of a summons before Lord *Mansfield*, C. J. in 1782, for a procedendo to remit an indictment

(*a*) See *Rex* v. *Smith*, Cowp. 24. and *Rex* v. *Young*, 2 T. R. 472.

1825.

The King
v.
Saunders.

to the sessions, which had been removed by the defendants into this Court, that learned judge held, that where part of the indictment was laid on the statute 30 *Geo.* 2. c. 24. and the rest at common law, the certiorari was not taken away, and therefore he refused the procedendo.

Abbott, C. J.—I am also of opinion that where there are counts at common law mixed up with counts on the statute, the certiorari is not taken away; and it is very reasonable that this should be so. Here is an indictment containing a great many counts for a conspiracy at common law, and there are one or two perhaps introduced on the statute for obtaining goods under false pretences. In all cases of this kind, it might be very easy to introduce counts on the statute for the very purpose of depriving a defendant of the benefit of the certiorari, if this construction were put upon the statute; which I think ought not to receive the sanction of the Court.

Rule absolute for a certiorari.

Thursday, February 10.

Where lands had been taken possession of under an elegit, the Court ordered it to be referred to the master to take an account of the rents and profits received, and if, upon inquiry, it appeared that the debt had been satisfied, possession to be restored to the defendant.

Price *v.* Varney.

Campbell on a former day obtained a rule to shew cause why it should not be referred to the master to take an account of the rents and profits received by the plaintiff out of an estate of the defendant taken possession of under a writ of elegit, and why he should not restore possession of the estate to the defendant, if, upon such reference, it should be found that his judgment had been satisfied. The affidavit in support of the motion stated, that the plaintiff's original judgment amounted only to 43*l.*; that he had issued an elegit, and had brought ejectments to take possession of the lands in question; and that, in point of fact, he had received out of the rents and profits more than was sufficient to satisfy his judgment.

1825.

PRICE v. VARNEY.

Brodrick now shewed cause on an affidavit, in which the plaintiff denied that the receipts were sufficient to satisfy the original judgment, and the costs of the elegit and ejectments; and added, that the defendant had only a life interest in the estate. This certainly seems a reasonable application, though it is one of some novelty. The question is, whether the Court can relieve the defendant in this mode, even assuming that, upon the merits of his case, he is entitled to such relief. Now here the motion seeks too much, for it requires not merely that an account shall be taken, but that possession of the land shall be restored. The only known mode of getting back possession of lands taken under an elegit, is by ejectment, by scire facias ad computandum, or by an application to a court of equity. In a court of law, all that can be done is, to see into the value of the property extended under the elegit; whereas, in a court of equity, an account may be taken of the actual value of the proceeds, and there interest is allowed upon the debt. *Godfrey* v. *Watson* (*a*), *Earl Ruth* v. *Earl Bradford* (*b*). Here the defendant is endeavouring, by this summary mode, to obtain that relief which can only be obtained by one or other of the modes pointed out. There is this further difficulty, that as the defendant has only a life estate in the lands, the plaintiff may be called upon hereafter to account to the person legally entitled to the reversion, for rents and profits supposed to have been received by him when he was not in possession.

Campbell, contrà, was stopped by the Court.

BAYLEY, J.—If the master, upon the investigation of the case, finds any difficulties in complying with the terms of the rule to their full extent, he will present them to the Court. I certainly see, at present, no difficulty in ordering that possession of the lands be restored to the defendant if it shall be found that the whole of the plaintiff's demand has been satisfied out of the rents and profits. That I take to be a

(*a*) 3 Atk. 517. (*b*) 2 Ves. sen. 589.

1825.

PRICE v. VARNEY.

natural consequence resulting from the writ of elegit. The elegit only requires the sheriff to satisfy the debt; and this rule only requires that the master shall see whether the debt has or has not been satisfied. If it has, I see no reason why possession of the lands should not be restored to the defendant. The master will take an account of the rents and profits, and if he finds that the debt is satisfied, he will direct possession to be restored; and, if no difficulty arises, this mode of proceeding will certainly be a great saving of expense to both parties. If the master finds any difficulty, it will be matter for further consideration.

The other judges concurred.

Rule absolute.

The KING v. The Mayor and Corporation of FOWEY.

Friday, February 11.

Attachment ordered against the mayor of a corporation for not making a return to a peremptory mandamus within the time prescribed by the writ, though there was no personal service thereof.

CARTER moved for an attachment against the defendants for not making a return to a peremptory mandamus. By the exigency of the writ they were required to make a return within six days, which they had not done. The mandamus had been served on the town clerk, but not personally on the defendants, and there was a doubt in the crown office whether an attachment would lie without personal service of the mandamus. Now in the case of a sheriff there is no personal service of the body rule to found a proceeding by attachment. The sheriff is a public officer, and the defendants stand in the same situation. In principle, therefore, there is no reason why the attachment should not lie in this case without personal service.

LITTLEDALE, J. (a)—It seems reasonable that an attachment should go. If the defendants wanted farther time to make their return, they ought to have applied to the Court for that purpose. Let the attachment go.

Rule granted.

(a) The only Judge in Court.

1825.

Friday, February 11.

The want of a ca. sa. against the principal, cannot be taken advantage of by the bail as an irregularity, but must be pleaded to the fi. fa.

PHILPOT v. MANUEL.

BOLLAND on a former day obtained a rule nisi to set aside two writs of scire facias against the bail in this case for irregularity, the irregularity suggested being, that no capias ad satisfaciendum had been filed against the principal. There was another objection as to the service of the writs of scire facias upon the bail.

Chitty now shewed cause. If there be any foundation for the objection that there is no ca. sa. filed against the principal, the bail must take advantage of it by plea, and not by motion. The want of a ca. sa. is not an irregularity, but is matter of substance, and can only be pleaded.

Bolland, contrà. This is matter of practice, and it has been held, that mere matter of practice is not pleadable. *Elliot* v. *Lane* (*a*), *Cherry* v. *Powell* (*b*). But at all events, the service of the writs of scire facias is irregular, and it is sworn that the principal was rendered, before the bail were bound to plead.

ABBOTT, C. J.—We are of opinion, that the proceedings upon the writs of sci. fa. must be set aside, but not on the ground that no ca. sa. was filed against the principal. The want of a ca. sa. is not properly an irregularity, but is matter of substance, of which the bail can only take advantage by plea. This case is distinguishable from *Elliot* v. *Lane*, and *Cherry* v. *Powell*, for in both, mere matter of practice was pleaded. Here the objection goes to the merits of the case. Under the peculiar circumstances however, disclosed in the affidavits respecting the service of the writs of sci. fa., we think the proceedings thereon should be set aside, but without costs.

PER. CUR.

Rule absolute without costs (*c*).

(*a*) 1 Wils. 334. (*b*) Ante, vol. i. 50. (*c*) Vide *Dudlow* v. *Watchorn*, 16 East, 39. *Thackray* v. *Harris*, 1 B. & A. 212. Tidd, 744. 1182, 3. 8th ed. 1 Arch. Pr. 290. 1st ed.

1825.

Saturday February 12.

The offence of usury is complete only in the place where the money is received. So the offence of obtaining money under false pretences, created by 30 *Geo.* 2. c. 24., is complete only where the money is obtained.

PEARSON *v.* M'GOWRAN.

DEBT for penalties under the statute of usury. The venue was laid in *Middlesex*, and the declaration alleged, that usurious interest was secured to the defendant by a bill of exchange accepted and afterwards paid by a person named *Bottrill*. At the trial before *Abbott*, C. J., at the adjourned *Middlesex* sittings after last *Trinity* term, the contract was proved to have been made, and the acceptance to have been given, as alleged, in *Middlesex*, but the bill appeared to have been paid in *London*, to Messrs. *Currie* and Co., the holders, to whom the defendant had indorsed it. It was thereupon objected on the part of the defendant, that the offence of usury could not be complete until the illegal interest was actually received, that was, until the bill was paid, and consequently, the bill having been paid in *London*, the venue ought to have been in *London* also, instead of *Middlesex*. The Lord Chief Justice declined to nonsuit, but reserved the point, and the plaintiff had a verdict, with liberty to the defendant to move to enter a nonsuit.

Denman, C. S., in *Michaelmas* term last, obtained a rule nisi accordingly; he cited 31 *Eliz.* c. 5. s. 2., 21 J. 1. c. 4., *Dyer*, 346. b. pl. 9. *Fisher* v. *Beasley* (*a*), and *Scott* v. *Brest* (*b*).

Scarlett, on a former day in this term, shewed cause. The venue is rightly laid. The contract was made, and the acceptance given, in *Middlesex*, and the bill being paid in *London* makes no difference. The venue might have been laid in either county, because where there are two facts which are necessary to constitute one offence, and they are done in different counties, the plaintiff may ex necessitate lay the venue in either. That rule is laid down in *Scott* v. *Brest* (*b*) by *Ashurst*, J. who cites 1 *Lord Raymond's* Rep. 172.

(*a*) 1 Doug. 231. (*b*) 2 T. R. 238.

as an authority, and has since been recognized in *Scurry* v. *Freeman* (*a*), and *Rex* v. *Burdett* (*b*). Here, it must be admitted that, until the bill was paid, the usury, as an offence, was not complete; but as the corrupt contract and the consequent acceptance of the bill were essential constituent parts of the offence, and they took place in *Middlesex*, the venue might be well laid there, though it might also have been laid in *London*.

Denman, C. S. and *Comyn*, contrà. The acceptance of the usurious interest is the offence; therefore, where the money is paid the venue must be laid, and there only. The stat. 12 *Ann.* stat. 2. c. 16. s. 1. pointedly distinguishes between the act of making the corrupt contract, and that of receiving the illegal interest. It enacts, first, that no person shall take, directly or indirectly, for the loan of any monies, above the value of 5*l.* for the forbearance of 100*l.* for a year, and declares that all contracts made for the taking of higher interest shall be void; and second, that all persons who shall, upon any contract, *take, accept and receive*, by way of any corrupt bargain, &c., for the forbearance for a year of money, above the rate of 5*l.* per cent., shall forfeit treble the value. So that the making a corrupt contract is no offence, and incurs no penalty; the only consequence is, that the contract is void and cannot be enforced; the offence is the receiving the illegal interest, and till that is received, no offence is committed and no penalty attaches. For this construction of the statute, *Fisher* v. *Beasley* (*c*), and *Madox* v. *Hammett* (*d*) are authorities. *Scurry* v. *Freeman* (*e*) does not govern the present case, for there it was only held, that where a draft was given for usurious interest, and a receipt for it taken in one county, and the draft subsequently cashed in another, the usury was complete, and the venue must be laid in the latter county. *Rex* v. *Burdett* (*f*) is

(*a*) See Ld. Raym. and 2 Bos. & Pul. 381.
(*b*) 4 B. & A. 95. (*c*) 1 Doug. 231. (*d*) 7 T. R. 184.
(*e*) 2 Bos. & Pul. 381. (*f*) 4 B. & A. 136.

1825. PEARSON v. M'GOWRAN.

equally inapplicable to this case, though a reference to it is important, as shewing the true rule upon this subject, as it was there laid down by *Holroyd*, J., namely, that where a misdemeanour is charged which consists of several parts, the venue must be laid in that county in which so much of the charge as amounts in law to a misdemeanour can be proved to have been committed. According to that rule, the venue here was clearly wrong, for there was no offence at all committed in *Middlesex*. The case of *Scott* v. *Brest* (a) is an authority for the defendant here, for it was there held, that the venue must be laid where the offence was complete, though it was also held, that the offence was complete where the accounts were finally settled, and the last balance paid over. In *Bird's* case, which is cited in *Dixie's* case (b), the plaintiff only proved the place where the money was received, and gave no evidence of the place where the contract was made, and yet he recovered, for it was held, that the contract was only inducement to the receipt of the money, and that the venue must be laid where the receipt took place: therefore it was unnecessary to shew where the contract was made. In the face of all these authorities it is impossible to doubt, that the venue in this case ought to have been laid in *London*, and consequently this rule, to enter a nonsuit, must be made absolute.

The Court took time to consider of their judgment, which was now delivered by

ABBOTT, C. J.—This was an action of debt for penalties under the statute against usury. It was proved at the trial, that the corrupt contract was made in *Middlesex*, but that the money paid in pursuance of it was received in *London*. The venue was laid in *Middlesex*, and the question reserved was, whether it was properly laid there, or ought to have been laid in *London*. Two very able judges, Mr. Justice *Ashurst* and Mr. Justice *Buller*, did certainly throw out an opinion

(a) 2 T. R. 238. (b) 1 Leon. 97.

1825.

PEARSON v. M'GOWRAN.

in the case of *Scott* v. *Brest* (*a*), that under such circumstances the venue might be laid in either county; but, upon a careful perusal and consideration of the statute 12 *Ann.* stat. 2. c. 16. we are of opinion, that in an action for penalties under that statute, the venue can be laid only in that county where the offence is complete; that is, where the usurious money is paid. The statute first enacts, "that every person who shall upon any contract, to be made after a time therein specified, *take, accept and receive,* by way or means of any corrupt bargain, &c. above the sum of 5*l.* for the forbearing of 100*l.* for a year, shall forfeit the treble value of the monies lent;" and it then provides, "that the forfeiture shall be, one half to the Queen, her heirs and successors, and the other half to him that will sue for the same *in the same county where the offence is committed, and not elsewhere.*" Then the only question is, what is the offence? We think it consists in the taking, accepting, and receiving usurious interest. The corrupt contract precedes, and forms no part of the taking, therefore the offence, here, was not committed partly in *Middlesex,* and partly in *London;* and the only materiality of the contract is to shew the real nature and consequent illegality of the taking. The present case resembles that of *Rex* v. *Buttery* (*b*). That was an indictment for obtaining money under false pretences, founded on the statute 30 *Geo.* 2. c. 24. That statute enacts, "that all persons who knowingly and designedly, by false pretences, shall obtain from any person money, goods, &c. with intent to cheat or defraud any person of the same, shall be deemed offenders," &c. The offence, therefore, is in that statute evidently made to consist, not in the using a false pretence in order to obtain money, but in actually obtaining money by using a false pretence. In the case cited, the indictment was presented in *Herefordshire,* and the false pretence was proved to be used in *Herefordshire,* but the money was obtained in *Monmouthshire;* and the judges were of opinion

(*a*) 2 T. R. 238.

(*b*) *Rex* v *Burdett,* 4 B. & A. 179. cited by *Abbott,* C. J.

1825.

Pearson v. M'Gowran.

that the indictment was brought in the wrong county. That case certainly comes nearer to the present than any of those which were either cited in argument, or referred to by ourselves; and upon that authority, as well as upon what we consider the true construction of the statute, we are of opinion that the venue in this case ought to have been laid in *London*, and not in *Middlesex*, and therefore that the rule for entering a nonsuit must be made absolute.

Rule absolute.

Saturday, February 12.

SAWTELL v. GILLARD.

A defendant under terms of pleading *issuably* cannot *demur specially*; if he does, the plaintiff may sign judgment as for want of a plea.

LANGSLOW had on a former day obtained a rule nisi for setting aside the interlocutory judgment signed in this case, with costs for irregularity, and staying the proceedings in the mean time. The defendant had been under terms of pleading issuably, but instead thereof demurred *specially* to the plaintiff's replication, for duplicity. The plaintiff treated the demurrer as a nullity and signed interlocutory judgment, and the question now was whether the judgment was regular.

Merewether, in shewing cause, was stopped by the Court.

Langslow, in support of the rule, submitted that, though a special demurrer might, on general principles, be treated as a violation of the rule by which the defendant was under terms to plead issuably, yet this was a peculiar case in which the Court, in the exercise of its equitable jurisdiction, would relax the rule. Here the plaintiff's replication was clearly bad for duplicity, and the only mode in which the defendant could take advantage of the objection was by special demurrer. There was no suggestion on the other side that it was a sham demurrer. Great inconvenience would arise if

1825.
SAWTELL v. GILLARD.

the rule was held strictly, that in every case in which a defendant is under terms to plead issuably, he must do so at all hazards. He was proceeding to cite cases in illustration of the hardship which might arise from the rule in particular instances, when

ABBOTT, C. J. said—We cannot act upon the suggestion of inconvenience or hardship arising in particular cases. Admitting that this special demurrer is bonâ fide, and that the defendant may sustain prejudice by its disallowance, still we must act upon general rules. The only general rule which the Court can lay down is, that where a party has obtained time on the terms of pleading issuably, and by his pleading fails to bring the merits of the case or some question of fact, or some question of law arising upon the facts, in issue, he does not comply with the conditions of the order. Here the defendant was bound to plead issuably, instead of which he demurs to the replication specially upon a collateral circumstance. I am not prepared to say that the objection to the plaintiff's replication would not be good upon general demurrer; but if we were to allow the defendant to strike out his special demurrer, and demur generally, and point out his objections to the replication, still that could only be upon the terms of paying the costs of setting aside the judgment and producing an affidavit of merits. But by doing so the defendant would thereby gain that which was probably the object of this special demurrer, namely, time. I am of opinion that this rule must be discharged.

PER CUR.

Rule discharged (*a*).

(*a*) Vide 3 Burr. 1788. 2 Bos. & Pul. 446. 7 T. R. 536. 1 East, 110. 2 Sir W. Bl. 223. Sayer, 88. 5 Taunt. 314. 1 Marsh. 80. S. C. 3 M. & S. 150. 1 Chit. Rep. 711. Ante, vol. iv. 779.

1825.

Saturday, February 12.

Two defendants were held to bail for an assault and battery, and the plaintiff declared against one only:—Held, that he might do so.

WILSON v. EDWARDS.

THIS was an action of trespass, assault, and false imprisonment. The plaintiff had sued out his writ against the defendant, and another person named *Thompson,* and by a judge's order both were held to special bail in the sum of 30*l. each,* the plaintiff swearing that the defendants were about to leave the kingdom. Having given bail, the plaintiff declared against *Edwards* only. On a former day a rule was obtained calling on the plaintiff to shew cause why the declaration against this defendant should not be set aside for irregularity, with costs, on the ground that, as the plaintiff had sued out bailable process jointly against two defendants, he could not declare against one alone.

Comyn now shewed cause. In actions of tort each defendant is severally liable, and therefore they may be declared against separately. The rule as to declaring jointly against all the defendants in bailable process, applies to *contracts* and not to *torts,* and therefore the plaintiff was not bound to declare against both defendants.

D. F. Jones, contrà. Whether in cases *ex contractu* or *ex delicto,* the same rule as to declaring applies, if the defendants are jointly held to bail. It is an invariable rule that the declaration must conform with the affidavit to hold to bail and the process. Here both defendants are held to bail, as for a joint tort, and they ought to be joined in the declaration, otherwise the plaintiff is irregular. He cited *Lewin* v. *Smith* (*a*).

(*a*) 4 East, 589. See *Holland* v. *Johnson,* 4 T. R. 695. *Stables* v. *Ashley,* 1 Bos. & Pul. 49. *Spencer* v. *Scott,* id. 19. *Chapman* v. *Eland,* 2 N. R. 82. *Moss* v. *Birch,* 5 T. R. 722. *Jonge* v. *Murray,* 1 Marsh. 274. *Thompson* v. *Cotter,* 1 M. & S. 55.

BAYLEY, J.—The principle which is applicable to contracts does not hold in torts. In the latter each defendant is liable, but in the former, where the promises are joint, the declaration is joint. There the defendants are joined in one ac etiam, and cannot be severed. Here, though the original process be joint, yet the defendants are severally liable and may be declared against accordingly. I know of no case in which the rule contended for has been held applicable to actions in tort; and on principle I think it does not apply to such cases.

ABBOTT, C. J. and HOLROYD, J. concurred.

LITTLEDALE, J. was absent.

Rule discharged.

PALMER v. DIXON.

Saturday, February 12.

Defendant first, pleads in abatement, and without applying to the Court for leave to withdraw that plea, secondly, pleads a judgment recovered:—Held, that plaintiff was at liberty to sign judgment as for want of a plea.

THIS was an action against the defendant as acceptor of a bill of exchange, to which he pleaded, first, a plea in abatement, and then finding that this plea was a nullity, he pleaded, secondly, a sham plea of judgment recovered, without applying to the Court for leave to withdraw his first plea. On a former day a rule nisi was obtained for leave for the plaintiff to sign judgment as for want of a plea, on an affidavit of these facts, and that the defendant had repeatedly promised to pay the bill before action brought.

ABBOTT, C. J.—We think this rule must be made absolute. Here the defendant files two pleas, in succession, a plea in abatement, and a plea of judgment recovered. How was the officer to know in what form to make up the record? He could not determine by which plea the defendant meant to abide. If the defendant, upon discovering

1825. PALMER v. DIXON.

that his plea in abatement would not avail him, had applied to the Court to be at liberty to withdraw that plea, the Court would probably have allowed him so to do, but then it would only have been on the terms of pleading issuably. Should we then permit him by his own act to gain an advantage which, at all events, could only be obtained with the sanction of the Court? We think not, and therefore this rule must be made absolute with costs.

J. Evans for the plaintiff; and *Campbell* for the defendant.

Rule absolute, with costs.

Saturday, February 12.

CAVE *v.* MASSEY.

If defendant, as matter of indulgence, obtains time to plead, on the condition of giving plaintiff judgment as of the term in which the time is obtained, he must give an *available* judgment, and cannot afterwards bring a writ of error.

J. WILLIAMS had obtained a rule calling on the defendant to shew cause why the writ of error brought by him should not be quashed, or why the plaintiff should not be at liberty to take out execution notwithstanding its allowance. The affidavit in support of the motion stated, that in *Michaelmas* term the defendant had obtained farther time to plead, on condition that the plaintiff should have judgment of that term, and that the deponent believed the writ of error to have been brought for delay.

D. F. Jones now shewed cause against the rule, and contended that the Court could not, under the circumstances of this case, quash the writ of error. In order to justify such a proceeding it must appear, by some admission or declaration of the defendant himself, that the writ was brought for delay. The mere assertion or belief of the deponent that such was the defendant's object is not sufficient. It is true that the defendant obtained farther time to plead on the stipulation of giving judgment of *Michaelmas* term, but still that condition would not deprive the defendant of his right

1825.
CAVE v. MASSEY.

to bring a writ of error. If the defendant had sought an unreasonable indulgence in requiring farther time to plead, it was competent to the plaintiff to stipulate, as the price of such indulgence, that no writ of error should be brought, but having neglected to require the imposition of that term, he cannot now gain such an advantage by retrospection.

ABBOTT, C. J.—I think this is a case in which we ought to quash the writ of error. What is the spirit and meaning of the undertaking that the plaintiff shall have judgment of *Michaelmas* term? Clearly that he was to have an *available* judgment. By allowing the defendant to bring a writ of error that object would be defeated; and, in fact, the defendant has now gained a term by the violation of the condition imposed as the price of obtaining farther time to plead. The rule must be absolute.

BAYLEY, J. and HOLROYD, J. concurred(a).

Rule absolute.

(a) *Littledale*, J. was absent.

PLUNKET v. BUCHANAN.

Saturday, February 12.

An attorney making an affidavit in support of an application to reverse an outlawry against a defendant who does not appear personally, must shew in express terms, that he is duly authorized by the outlaw to make the application.

ON shewing cause against a rule nisi for reversing an outlawry on payment of costs, and on the defendant's putting in and perfecting bail, in the alternative of satisfying the judgment or rendering the defendant,

D. F. Jones and *Bompas* objected in limine, that the attorney who made the affidavit in support of the motion, did not describe himself as the defendant's attorney or agent, nor did he state that the application was made at the defendant's instance and request, which he was bound to do, inasmuch as the defendant did not appear in person. Previously to the 5 *W. & M.* c. 18. s. 3. the outlaw must have appeared

1825.

PLUNKET v. BUCHANAN.

in person, and though by that statute he may appear *by attorney*, yet when the application is made by the attorney, the latter must shew distinctly that he is properly authorized for that purpose. They cited *Volet* v. *Waters*(a), where this point was expressly decided.

F. Pollock and *Tindal*, contrà. As there is no appearance to the proceedings, the deponent could not with propriety describe himself as the defendant's attorney. But it is unnecessary that the deponent's authority should actually appear on the face of the affidavit. The appearance of the attorney is itself a sufficient voucher to the Court that he has been duly instructed by the defendant to make the application. The Court cannot presume that he is a mere volunteer, who interferes without the authority of the party who is immediately interested in the application.

ABBOTT, C. J.—This point appears to have been expressly decided in *Volet* v. *Waters*, and I think rightly. The deponent must shew that he has some authority to act for the defendant; otherwise a mere stranger might come in, which cannot be permitted. If the outlaw does not appear in person, it should be expressly stated in the affidavits that the attorney was authorized by him to make the application on his behalf. I think this rule must be discharged.

BAYLEY, J. and HOLROYD, J. concurred (b).

Rule discharged.

(a) Ante, vol. iii. 55. (b) *Littledale*, J. was gone to chambers.

Saturday, February 12.

KEMSETT v. WEST.

A coal-merchant residing and carrying on his business at *Lambeth*, in *Surrey*, but keeping a counting-house in the city of *London* for the purpose of receiving orders, is not entitled to the privilege of being sued only in the *London* Court of Requests, as a person seeking his livelihood in the city.

ABRAHAM, on a former day, obtained a rule calling on the plaintiff to shew cause why he should not bring the

1825.

KEMSETT v. WEST.

postea into Court and file the plea roll, so that the defendant might enter a suggestion thereon that the debt recovered in this action did not amount to 5*l.* and that at the time of commencing the action the plaintiff and defendant were both resident and seeking their livelihood within the city of *London,* and the defendant liable to be summoned to the Court of Requests there, pursuant to the statute 39 & 40 *Geo.* 3. c. 104. (public local). It appeared from the affidavits that the defendant carried on the business of a coal-merchant at *Lambeth,* in the county of *Surrey,* where he resided, but kept a counting-house at No. 14, *Pavement, Moor Fields,* within the city of *London,* for the purpose of receiving orders for coals, but did not reside or otherwise carry on business there or seek his livelihood. The goods in question were ordered in *London,* where the plaintiff resided, but were, in fact, delivered to the defendant at *Lambeth.* The question, under these circumstances, was, whether the defendant was privileged to be sued only in *London* as a person seeking his living there.

Chitty shewed cause against the rule. As this defendant only keeps a counting-house in *London* for the purpose of receiving orders for coals, he is not entitled to the privilege now claimed. The statute, 39 & 40 *Geo.* 3. c. 104. extends only to " persons residing or inhabiting within the said city or its liberties, or keeping any house, warehouse, shop, shed, stall, or stand, or seeking a livelihood, or trading or dealing within the same city or liberties." Now in the first place a *counting-house* is not mentioned in the act, and therefore the mere occupation of such a place would not confer any privilege. Then can the plaintiff be said to be seeking a livelihood within the city of *London?* Clearly not. His permanent place of business is in *Surrey;* whereas in *London* he makes no shew of business, but merely keeps a counting-house, for the convenience of his customers, to receive orders. He cited *Jefferies* v. *Watts* (*a*), *Gray* v. *Cooke* (*b*),

(*a*) 1 N. R. 153. (*b*) 8 East, 336.

1825.
KEMSETT
v.
WEST.

and *Skinner* v. *Davis*(*a*), and he relied upon *Stephens* v. *Derry*(*b*), in which the Court held that a husband domiciled in *Middlesex*, where his wife carried on business, though he was employed as a clerk in the office of solicitors in *London*, is not privileged to be sued only in *London* as a person seeking his livelihood there, for that means seeking the *whole* of his livelihood within the city.

Abraham, contrà, contended, first, that a counting-house was within the spirit and meaning of the statute; and, second, that it was not necessary the defendant should seek the *whole* of his livelihood within the city of *London* in order to entitle him to the privilege.

ABBOTT, C. J.—I am of opinion, on the authority of the case of *Stephens* v. *Derry*, that this rule must be discharged. That case decides that where the party claims the privilege of being sued in the *London* Court of Requests, the city of *London* must be the *only* place in which he seeks his livelihood. Here it is true that the defendant has a counting-house in the city of *London*, but that is not the only place in which he seeks his livelihood, and "counting-house" is not one of the words mentioned in the act. Strictly speaking this defendant is not seeking his livelihood in *London* by trading. His place of business is in *Surrey*, where he carries on his trade, and he merely has this counting-house for the purpose of receiving orders. In any view, therefore, of the words of the statute, I think the defendant is not entitled to be sued only in *London*.

BAYLEY, J. and HOLROYD, J. concurred (*c*).

Rule discharged.

(*a*) 2 Taunt. 196.
(*b*) 13 East, 161. 16 East, 147. See 15 Id. 647. Tid. 990. et. seq. 8th ed.
(*c*) *Littledale*, J. was absent.

END OF HILARY TERM.

1825.

Ewer and another, Assignees of Ray and another, *v.* Ambrose and John Baker (a).

Where the first witness called for a defendant disproved the fact relied on in defence:—Held, that the defendant was not thereby concluded, but might prove the fact by other witnesses. *Quære*, whether the witness's own answer to a bill in Chancery was admissible on the part of the defendant, to contradict his own witness.

DECLARATION in assumpsit for money had and received, and upon an account stated. The defendant, *John Baker*, suffered judgment by default, and he having died pending the suit, there was a suggestion of his death entered on the roll. The defendant, *Ambrose*, pleaded in abatement the non-joinder of one *Samuel Baker* as a defendant. Replication, that *Samuel Baker* did not undertake, &c. jointly with the defendants. Issue thereon. At the trial before *Gaselee*, J. at the last *Suffolk* summer assizes, *Samuel Baker* was called on the part of the defendant to prove the plea in abatement. He denied ever having been a partner with the defendants, but admitted that he was to have been a partner, and that articles of partnership were prepared for that purpose, but were never executed. He further admitted that he had drawn checks in the name of the firm and had received from the bankrupts, who were the defendants' bankers, large sums on account of the firm; and that he resided on the premises where the business was carried on; but the profits, he declared, were wholly divided between the defendants *Ambrose* and *John Baker*. It was then proposed, in order to prove the partnership which the witness had denied, to read in evidence the answer of *John* and *Samuel Baker* to a bill in Chancery, filed against them by *Ambrose* in 1821, to compel a dissolution of the partnership and a statement of the accounts. This evidence being objected to on the part of the plaintiffs, as inadmissible, on the ground that it was produced by the defendant in contradiction of his own

(a) Three of the Judges of this Court sat, by virtue of the King's warrant issued during *Hilary* term, from the 14th until the 19th of *February*, and from the 11th until the 16th of *April* inclusively, and in those intervals the following cases were decided.

1825.
EWER
v.
AMBROSE.

witness, the learned judge inclined to the objection, but, in order to save the expense of a second trial, he received the evidence, giving the plaintiffs leave, in case it should become necessary, to move to enter a verdict for them. The answer being read, stated, that *Samuel Baker* became a partner with *John Baker* (his father) and *Ambrose*, in 1816, and continued so down to the date of the answer in *April*, 1821. Two other witnesses were then called to prove the partnership, who were objected to, and admitted, on the grounds already stated. The first deposed that he met the two *Bakers* and *Ambrose* by appointment on the 13th of *April*, 1820, for the purpose of ascertaining the state of the partnership affairs; that they all three took an active part at the meeting; and that he (the witness) actually borrowed a sum of money to lend to *Ambrose*, to enlarge his capital and to enable him to enter into partnership with the two *Bakers*. The second stated that he had had dealings with the firm of *Baker* and *Ambrose*; that it consisted of *John Baker*, *Samuel Baker*, and *Ambrose*; and that he fully believed *Samuel Baker* to be as much a partner as either of the others. The learned judge left the case to the jury, directing them to find for the plaintiffs or the defendant, according as they gave credit to *Samuel Baker's* deposition in the answer in Chancery, or to his testimony in Court; and they found a verdict for the defendant. In *Michaelmas* term last a rule nisi was obtained to enter a verdict for the plaintiffs, upon the objection taken at the trial; against which

Storks and *Dover* now shewed cause. It is a well-known rule that a party shall not be allowed, by general evidence, to discredit his own witnes (*a*); but this case does not fall within it. This case is governed by that of *Alexander* v. *Gibson* (*b*), where it was held, that if a witness unexpectedly gives evidence against the party calling him, another witness may be called to prove the facts otherwise.

(*a*) Bull, N. P. 297. (*b*) 2 Camp. 556.

Lord *Ellenborough's* judgment there is strictly applicable here. "If," said his lordship, "a witness is called on the part of the plaintiff, who swears what is palpably false, it would be extremely hard if the plaintiff's case should be, for that reason, sacrificed. The party is not to set up so much of a witness's testimony as makes for him, and to reject or disprove such part as is of a contrary tendency. But if a witness is called, and gives evidence against the party calling him, I think he may be contradicted by other witnesses on the same side, and that, in this manner, his evidence may be entirely repudiated." And, the reason of this rule is obvious. In such a case the facts deposed to are evidence in the cause, and the latter witnesses are called not so much directly to contradict the testimony of the first, as to prove or disprove those facts. The impeachment of the witness's credit is only an incidental, though an unavoidable, consequence. For these reasons this rule ought to be discharged.

Rolfe, (*Scarlett* and *Frere*, Serjt. were with him,) contrà. The direct and necessary effect of the answer in Chancery was to destroy the credit of the defendant's own witness, upon whom he, in the first instance, rested his case. Now that a party is never allowed to do; such evidence is clearly inadmissible according to both the authorities cited on the other side. The parol evidence, therefore, was equally inadmissible, because it was offered to prove a fact which the former witness for the same party had already disproved. But even if the answer in Chancery was admissible, the witnesses in contradiction of *Samuel Baker* did not turn the scale against him, for they only swore that they believed he was a partner, whereas he swore positively that he was not.

BAYLEY, J.—There are many cases in which, where a witness called to prove a substantive fact disproves it, the party by whom he was called is entitled to prove the fact by means of other witnesses. Those, however, are all cases where the witness is called by necessity, being forced upon

1825.

EWER
v.
AMBROSE.

the party by the rules of law, as in the case of a subscribing witness to a deed or a will. In *Lowe* v. *Joliffe* (a), the subscribing witnesses to a will swore that the testator was insane, but the plaintiff was allowed to call other witnesses to prove his sanity. So in *Pike* v. *Badmering* (b), the subscribing witnesses to a will denied their hands, but the Court permitted the plaintiff to call other witnesses to contradict their evidence. This was not a case of that description; the witness was not forced upon the defendant here; but still I entertain no doubt, that where a witness gives evidence contrary to that which the party producing him may reasonably expect him to give, that party is at liberty to make out his case by other witnesses, and, therefore, I think the other witnesses for the defendant were properly admitted here. I do, however, entertain some doubt whether the witness's own answer in Chancery could properly be read by the defendant in contradiction of his testimony in Court. If the plaintiff, in order to discredit the witness, had wished to put in his answer in Chancery, he must first have asked him, on cross-examination, whether he had not in that answer sworn contrary to the fact he was then deposing to; and if he had denied having done so, the plaintiff might then have read the answer in evidence to contradict him. But without that preliminary question even the opposite party could not have read the answer in contradiction of the witness, and at any rate the defendant should not have been allowed to do so without the same previous step, even if he was entitled, under any circumstances, so to discredit his own witness, which, according to the present impression of my mind, I think he was not. Upon the whole, therefore, I think the answer in Chancery should not have been admitted, but at all events I think there ought to be a new trial, because the learned judge treated the answer as substantive evidence of a fact, which it certainly was not, and left it to the jury to say which they believed, the deposition of the witness in the answer or his testimony in Court, which

(a) 1 Bl. 365. (b) 2 Str. 1096. cited.

I think he ought not to have done. It seems to me, also, that the evidence of the witnesses for the defendant was not properly brought before the jury by the learned judge. Their evidence was properly admissible, because it was evidence of a fact in the cause (a); and therefore the jury should have been directed to consider, whether they were not satisfied upon their evidence, coupled with the other facts in the cause, that *Samuel Baker* was a partner. Upon these grounds I am of opinion, not that there should be a verdict entered for the plaintiffs, but that there should be a new trial.

HOLROYD, J.—I am also of opinion that there should be a new trial in this case. I think the rule of law is correctly laid down in *Alexander* v. *Gibson*, and I take it to be shortly this, that where a witness proves a case against the party calling him, the latter may shew the truth by other witnesses. But it is equally a rule of law, that if a party calls a witness to prove a fact which he supposes him capable of proving, he cannot, when he finds himself deceived, and that the witness disproves the fact, give general evidence to shew that he is unworthy of credit on his oath; he can only prove, by other evidence, that the witness was mistaken respecting the fact which he was called to prove. With respect to the answer in Chancery, I feel some doubt whether it was admissible at all. As general evidence that the witness was unworthy of credit, it was certainly inadmissible; it could be admissible, if at all, only to shew that he was mistaken as to the particular fact sworn to in the cause. But the learned judge left the answer to the jury as substantive evidence of the fact of a partnership, which it could not, upon any principle, amount to; and he did not leave to the jury the evidence of the other witnesses for the defendant, which was clearly admissible, and which might perhaps, coupled with the other facts in the cause, have fairly induced the jury to believe that there was an existing

(a) See Bul. N. P. 297.

1825.

EWER v. AMBROSE.

partnership. I am, therefore, of opinion that in both these respects the case was improperly presented to the jury, and that there ought to be a new trial.

LITTLEDALE, J.—I think a party is not concluded by the first witness he calls in support of his case, if that witness unexpectedly gives evidence against him. In such a case I think he is at liberty to proceed and call his other witnesses, and to have the whole of the testimony in the cause fully presented to the jury. He would, otherwise, be in a situation of dreadful hardship. Suppose, for instance, a party has five witnesses, upon whom he fairly and honestly relies to prove his case. If the first happens to deceive him, and to disprove the fact in question, is he to be deprived of the testimony of the other four, merely because they state the fact contrary to the declaration of the first? It would, in my opinion, be most unjust so to decide. If the other four had been first called, and after them the one who disproved the fact, the whole case would be one for the jury, and they would have to decide upon the evidence to whom they chose to give credit, the four or the one; for the order in which the witnesses are called ought to be a matter of perfect indifference to the issue of the cause. The subsequent witnesses called for the defendant in contradiction of the first were, therefore, clearly admissible, and their evidence ought to have been fully presented to the jury, which it certainly was not. But the answer in Chancery stands upon a very different footing. That was not substantive evidence per se of any fact in the cause, though it was left as such to the jury. Whether it was evidence even to contradict the particular fact to which the witness had sworn, may be doubtful, though that it is not now necessary to decide; for at all events it was not evidence to the extent in which it was left to the jury.

Rule absolute for a new trial.

1825.

LAIDLER v. ELLIOTT, Gent. one, &c.

The two terms allowed by the rule of Court, *H. T.* 26 *G.* 3. for charging a prisoner in execution, must be computed from the date of the notice of surrender. Therefore, in case against an attorney for negligence, where plaintiff had recovered a judgment against *A.* who surrendered in discharge of his bail on the day before the essoin day of *E. T.*, gave notice thereof two days afterwards, and, not being charged in execution during *E. T.*, was discharged in *T. T.*:— Held, that the action was not maintainable; first, because *A.* was improperly discharged; and, second, because the meaning of the rule of Court is doubtful.

DECLARATION in case, against an attorney for negligence, stated, that in *H. T.* 3 & 4 *Geo.* 4. plaintiff recovered a judgment in *K. B.* against one *Hall*, for 272*l.*; that pending that suit, to wit, in *E. T.* 3 *Geo.* 4. *Hall* put in bail; that after the recovery of the judgment, viz. on the 12th of *April*, 1823, *Hall* surrendered himself in discharge of his bail, and was committed to the custody of the marshal at the suit of plaintiff, and there remained till superseded; that plaintiff employed defendant as his attorney in that suit; that *Hall*, being so surrendered and committed, ought by the rule and practice of the Court of *K. B.* to have been charged in execution at the suit of plaintiff, in order to prevent his being discharged out of custody without paying off or making satisfaction to plaintiff for his damages, costs, and charges, of all which premises defendant had notice; yet defendant neglected to charge *Hall* in execution, whereby he was, on the 16th of *May*, 4 *Geo.* 4. discharged out of custody, the said damages, &c. being wholly unpaid, whereby plaintiff has been prevented from obtaining the same. Plea, not guilty, and issue thereon. At the trial before *Bayley*, J. at the last *Northumberland* summer assizes, it was proved that plaintiff had recovered a judgment against *Hall*, and that *Hall* had surrendered in discharge of his bail, as stated in the declaration. The surrender took place on *Saturday*, the 12th of *April*, the essoin day of *Easter* term was the 13th, and notice of the surrender was given on the 14th. In *Trinity* term, 4 *Geo.* 4. *Hall* applied to a judge of this Court to be discharged out of custody, contending that, pursuant to the rule of Court, *H. T.* 26 *Geo.* 3. (*a*), he ought to have been charged in exe-

(*a*) Which states, inter alia, that " in case of a surrender in discharge of bail after trial had or final judgment obtained, unless the plaintiff shall cause the defendant to be charged in execution within two terms

1825. LAIDLER v. ELLIOTT.

cution before the end of *Easter* term, and not having been so charged, was entitled to his discharge. The agent for the defendant in *London* attended before the judge, and opposed the application, but without success, and *Hall* was ordered to be discharged. The defendant afterwards applied to the Court for a new writ of capias ad satisfaciendum, on the ground that *Hall* had been improperly discharged, but the Court refused the application. Shortly after *Hall's* discharge, defendant, in a letter to plaintiff, stated that he never had intended to charge *Hall* in execution, because he suspected that he would take the benefit of the Insolvent Act. It was in evidence that if *Hall* had been detained in custody, some of his friends would have come forward with a part of the debt for the purpose of releasing him. It was contended, on the part of the defendant, that the discharge of *Hall* was irregular, not being warranted by the terms of the rule of Court, or that, at any rate, the import of the rule was so doubtful and its language so obscure, that the defendant, in putting an erroneous construction upon it, had not been guilty of that crassa negligentia, which could alone render him liable in this action. The learned judge reserved both points, and left the case to the jury, who found a verdict for the plaintiff. In *Michaelmas* term last, a rule having been obtained for entering a nonsuit,

E. Alderson shewed cause. It was the duty of the defendant to charge *Hall* in execution before the end of *Easter* term, and his omitting so to do is an act of negligence which renders him liable for the consequences. The plaintiff has been guilty of no laches; he is a sufferer through the ignorance or neglect of his attorney, and he ought to be remunerated by him. The rule of practice ought not now

next after such surrender, and due notice thereof, of which two terms the term wherein such surrender shall be made shall be taken to be one, in case no writ of error shall be depending or injunction obtained for stay of proceedings, the prisoner shall be discharged out of custody by supersedeas."

to be disputed, for it has been already twice decided, first, by *Best*, J. at chambers, when *Hall* obtained his discharge, and afterwards by the whole Court, when the defendant's application for a fresh writ of capias ad satisfaciendum was refused. [*Bayley*, J. I am by no means convinced of the propriety of those decisions. The rule of Court is very obscure, and perhaps the period should be calculated not from the date of the surrender, but from the date of the notice; which would make all the difference in the present case.] It is clear that the time within which the party is to be charged in execution, is to be computed from the date of the surrender, because there is no mention of notice in the second clause of the rule. It requires that "the defendant shall be charged in execution within two terms next after such surrender *and due notice thereof*;" but it does not go on to say "of which two terms the term wherein such surrender shall be made," *and such notice shall be given*, "shall be taken to be one." Secondly, this is crassa negligentia, and gives a right of action against the defendant. This is not a mere error in judgment, upon a nice and difficult point of practice, and as such excusable; if it were, this action would not be maintainable, for it has been held that a mistake in practice will not render an attorney liable for the consequences; *Pitt* v. *Yalden* (*a*). Here the defendant has not only failed to shew that his conduct arose out of a mistake in practice, but he has shewn precisely the contrary; for he has declared that he never intended to charge *Hall* in execution, and given his reason for it; therefore, however obscure the rule of Court may be, he has not been misled by it, and he falls within the principle laid down in *Russell* v. *Palmer* (*b*).

Wightman, contrà. The rule of Court requires that a defendant who has surrendered, and given due notice thereof, shall be superseded, unless he is charged in execution within two terms after the surrender; that can mean

(*a*) 4 Burr. 2060. (*b*) 2 Wils. 325.

1825. LAIDLER v. ELLIOTT.

only a surrender of which due notice has been given: that was the construction put upon the rule by the defendant, and in that construction he was clearly right: *Neil* v. *Lovelace* (a), *Rex* v. *The Sheriff of London* (b). But if there is doubt about the construction of the rule, the defendant was liable to share that doubt; and if the language of the rule is obscure, as it undoubtedly is, he has been only guilty of an error in judgment upon a point of practice, nice and difficult in its nature; and consequently he is not liable to this action: *Pitt* v. *Yalden* (c). Besides, as soon as he discovered his error, he did all he could to rectify it; first, by opposing *Hall's* discharge, and afterwards by applying to the Court for a fresh capias; and that is of itself an answer to the action: *Baikie* v. *Chandless* (d).

The Court took time to consider of their judgment, which was now delivered seriatim by the following Judges:

BAYLEY, J.—I am of opinion that there must be judgment of nonsuit in this case. It was an action against an attorney for negligence in not charging a defendant in execution in due time, whereby it was alleged the plaintiff lost the fruits of his judgment. For the defendant two points were insisted on at the trial; one, that the prisoner in the former suit was not regularly superseded, and therefore there was no negligence on the part of the defendant; the other, that even if the supersedeas was regular, still the defendant had not been guilty of such negligence as entitled the plaintiff to maintain this action. Now, I consider it to have been established by the case of *Pitt* v. *Yalden*, which was decided subsequently to the case of *Russell* v. *Palmer*, relied on for the plaintiff, that a mere mistake will not confer a right of action against an attorney for negligence, but that there must be shewn to have been in his conduct either crassa negligentia, or lata culpa. Upon the

(a) 8 Taunt. 674.
(b) 1 Price, 338.
(c) 4 Burr. 2060.
(d) 3 Camp. 17.

1825.

LAIDLER
v.
ELLIOTT.

authority of that case I should have been of opinion that even if the supersedeas had been regular, still the negligence in this case was not such as could confer a right of action; but that point it is unnecessary to decide, because upon a mature consideration of the rule of Court, I think the prisoner was not supersedable. The short facts of the case were these: *Hall*, against whom the plaintiff had recovered a judgment, surrendered in discharge of his bail on *Saturday* the 12th of *April;* the next day was the essoin day of *Easter* term; and on the day after, namely, the 14th, notice of the render was given. The render, therefore, was of *Hilary* term, but notice of it was not given until after the legal commencement of *Easter* term, and then the only question is, whether *Hilary* term is to be considered as one of the two terms, within which the defendant ought to have charged *Hall* in execution. I am of opinion that it is not, but that *Easter* term was the first of those two terms, and consequently that the defendant might have charged *Hall* in execution at any time before the end of *Trinity* term. In the latter section of the rule, the word "notice" is certainly omitted, and the word "surrender" stands alone; but as these words are coupled in the former part of the rule, I think the surrender spoken of in both places must be intended as the same; namely, a surrender after notice. Now, *Hall* was discharged within two terms next after notice of the surrender given, unless the intermediate time between the essoin day and the first day of the full term is to be considered as a part of the preceding vacation. It seems to me that it cannot be so considered. The ancient course of practice makes it plain that it never has been, and that the essoin day is in point of law part and parcel of the succeeding term; for, until comparatively modern times, one of the Judges regularly went down to the Court on the essoin day, for the purpose of opening the term and hearing the essoins. Inasmuch, therefore, as no notification of the render was made until after the legal commencement of *Easter* term, I am of opinion that *Hall* was irregularly

1825.
LAIDLER
v.
ELLIOTT.

superseded, that the defendant was guilty of no negligence in not charging him in execution during *Easter* term, and consequently that this action is not maintainable.

HOLROYD, J.—Upon a due consideration of the rule of Court, I concur in thinking that the prisoner was not in point of law supersedable. The surrender meant in the latter part of the rule is clearly a notified surrender, and until it has been notified it is incomplete; therefore the period for the supersedeas does not arrive until the expiration of two terms after the surrender and notice thereof. I am also clearly of opinion that the essoin day is in legal construction part and parcel of the term which it immediately precedes. It has been held by the Court of Common Pleas, that a bill cannot be filed against the warden of the *Fleet* in vacation; and the practice in that Court is that such a bill, when filed in vacation, is filed as of the preceding term, but when filed on the essoin day, or in the interval between that and the full term, is filed as of that, and not of the preceding term (*a*). With regard to the other principle bearing upon this case, I think there must be crassa negligentia or lata culpa in order to make an attorney liable. It was so decided, after much deliberation, in *Pitt* v. *Yalden*, and I concur in the propriety of that decision.

LITTLEDALE, J.—It was not incumbent on the defendant to charge *Hall* in execution until the end of *Trinity* term. The surrender contemplated by the rule is a surrender with notice thereof, and the period within which the prisoner is to be charged is to be computed from the time when such notice is given. Here the notice was not given till the 14th of *April*, which, being the day after the essoin day of *Easter* term, was part and parcel of that term; consequently the surrender was not complete till after the commencement of

(*a*) Vide *Crook* v. *Eyles*, 2 Marsh. 49. *Stock* v. *Eyles*, Id. 54. Tidd, 325, 8th Ed.

1825.

LAIDLER v. ELLIOTT.

Easter term, and the prisoner was not supersedable till the end of *Trinity* term. *Easter* term, in point of law, commences in fifteen days of *Easter*, that being the essoin day, and the day on which original writs are returnable. Formerly the first day of the term was the essoin day, the second day was the day of exception, and the third was the day of retorna brevium, when the sheriff returned his writs into Court, and on the fourth, which was called the quarto die post, the Court sat for the dispatch of business, from whence that became generally considered as the first day of the term (*a*). Upon the other point, I entirely agree with my learned brothers. In order to charge an attorney with negligence, there must be crassa negligentia, or lata culpa, and here there was neither the one nor the other.

Rule absolute for entering a nonsuit.

(*a*) Vide Tidd, 101. et seq. 8th ed.

GABAY and another *v.* LLOYD.

Policy on horses "warranted free from mortality." Special verdict finding, that on the voyage, in consequence of a storm, the horses broke down the partitions between them, and by kicking, bruised each other so much that they died; that a particular usage with respect to policies on live stock prevailed at *Lloyd's* Coffee-house in *London*, and was adopted both by the underwriters subscribing and the merchants effecting policies there; and that this policy was effected there:—Held, first, that this was a loss by perils of the sea, for which plaintiffs [illegible]t recover notwithstanding the warranty; and second, that, as it [illegible] plaintiff knew of the usage prevailing at *Lloyd's*, or was in the habit of effecting policies there, such usage did not bind him.

ASSUMPSIT on a policy of insurance on goods, as per annexed statement, valued at 2,800*l.*, on the ship *Aimwell*, at and from *Liverpool* to *Jamaica*; with a memorandum that horses were *warranted free from jettison and mortality*. Averments, that defendant had subscribed the policy for 200*l.*; that three horses, belonging to plaintiffs, and part of the goods valued in the statement, had been shipped on board the *Aimwell* at *Liverpool*; that the plaintiffs had an interest under the policy; and that the horses were lost by the perils of the sea. Plea, the general issue, and issue

1825.
GABAY v. LLOYD.

thereon. At the trial before *Abbott*, C.J. at *Guildhall*, the jury found a special verdict, containing, in substance, the following facts; viz. That an order was given for effecting the insurance; that the horses mentioned in the declaration were part of the goods valued in the statement; that those horses belonged to the plaintiffs, and were shipped on board the vessel; that the plaintiffs had an interest under the policy; that the premium had been paid; and that the vessel sailed. It then proceeded to state, that on &c. at &c. the said vessel, having the said three horses on board thereof, together with the other goods in the said order mentioned, the said horses, which were between decks, being at that time in good safety, and properly secured in stalls, with slings and halters, and having sufficient partitions between them, and also a person to attend to take charge of them; and the said vessel, being in every respect seaworthy, sailed from the port of *Liverpool* aforesaid on her said voyage; and that during the night of that day the wind came on to blow very hard, with excessive squalls, and the gale continued with excessive squalls. The said three horses, by the labouring of the vessel, broke their slings, and one of them, by kicking, broke down the partition between it and the next horse, in consequence of which the remaining partition, by the kicking of the two horses which were thus brought together, was also broken down, and the three horses, having then nothing to support them, were unable to stand, on account of the great rolling of the vessel; and that by their kicking they bruised and hurt each other so much, that about eight in the morning of the next day two of them were found dead, having their necks broken, and being otherwise excessively bruised, and that the third was in a dying state, and in about an hour and a half afterwards it died also from the wounds and bruises it had received; that the slings having been broken in the manner above mentioned, they could not for some time be repaired or replaced on account of the state of the weather, and from the danger of going among the horses, which were

1825.
GABAY v. LLOYD.

then loose and unsupported; and that the death of the horses was not occasioned by the neglect or default of the plaintiffs or their servants, or of the masters or mariners of the vessel, in the shipping, stowing, or taking care of the horses, but was owing to the circumstances set forth in manner aforesaid. That the vessel afterwards arrived at *Jamaica* with the residue of the goods, and that defendant had notice of the loss, and was called upon to pay his proportion thereof, but refused so to do; that according to the usage and custom among insurers or underwriters who were in the habit of subscribing policies of marine insurance at *Lloyd's* Coffee-house in *London*, and merchants and others effecting such policies of insurance there with such insurers or underwriters, there were, before and at the time of effecting the policy in the declaration mentioned, two descriptions of policies for insuring live stock on board ships on voyages from the ports of the *United Kingdom* to *Jamaica* and elsewhere; one, containing an exception from the perils insured against, or a warranty of freedom from mortality; another, not containing any such exception or warranty, and which latter description of policies usually contained words expressly including the risk of mortality; that for insurance by policies of the first description the premium has been much lower, in some instances four or five, in others six or eight times less, than for insurance by policies of the latter description, and has been usually the same as has been paid at the time upon inanimate goods. That in cases of insurance by policies of the first description, that is, policies containing such exception of losses by mortality, the assured have not claimed from the underwriters, and the underwriters have not paid to the assured, or been considered liable to pay a loss by the mortality of cattle, in any case where the vessel, on board which such cattle were, arrived safe; but it had always been usual, on policies of the latter description, to claim and pay a loss by mortality of cattle, in all cases where such loss had occurred, although the vessel arrived safe; and that on policies of

1825.

GABAY v. LLOYD.

each description, if the vessel had been lost on her voyage and the animals drowned, the underwriters had been in the habit of paying to the assured; that the policy of insurance in the declaration mentioned was effected at *Lloyd's* Coffee-house, and was then and there signed and subscribed by the defendant, who was an insurer and underwriter there.

Parke, for the plaintiffs. There are two questions here; first, whether, by the terms of this policy, the underwriters are liable for the loss occasioned by the mortality of the horses; and second, whether the usage stated in the special verdict is binding upon the plaintiff, and is conclusive to shew that the parties intended the underwriters to be exempted from such liability? The first question is answered in favour of the plaintiffs by the recent case of *Lawrence* v. *Aberdein* (a), and need not now be argued; that case is precisely in point with the present, and the arguments there adduced both by the bench and at the bar are exactly applicable here: to cite that case is to decide the present, on the first point at least, for the plaintiffs. Then, secondly, the usage, as here found, is not binding on the plaintiffs. The special verdict does not amount to a finding of a usage; it merely sets forth certain facts, which were evidence from which the jury might have arrived at the conclusion that there was a usage. The usage found is one adopted by insurers and underwriters, whose practice it is to subscribe policies at one particular place, called *Lloyd's* Coffee-house, and by merchants and traders who are in the habit of effecting such policies with such insurers and underwriters there; but it is not found to be a usage adopted generally in the city of *London*, nor that the plaintiffs were accustomed to effect policies at *Lloyd's* Coffee-house. There is, therefore, nothing to shew that they had any knowledge or notice of the existence of the usage, and consequently they cannot by law be bound by it. But, even admitting the usage to be well found, still it cannot affect the meaning or vary the

(a) 5 B. & A. 107.

construction of this policy. Undoubtedly it is a rule of law that usage is admissible as evidence to explain ambiguous language in a policy; but upon this principle, namely, that the parties appear to have contracted with a mutual knowledge of the usage; *Anderson* v. *Pitcher* (a) and *Robertson* v. *French* (b). Here the plaintiffs had no knowledge of the usage, and cannot have contracted with reference to it; they cannot, therefore, be bound by it, because it is not evidence to control the policy, and upon the words of the policy, uncontrolled by the usage, the defendant is clearly liable in this action.

Campbell, contrà. The horses were "warranted free from mortality." If those words are unambiguous, and clearly large enough to comprehend a loss like the present, then the underwriters are exempt from liability by the policy itself, independently of the usage: and if the words are ambiguous, and their operation doubtful, then the usage is evidence to explain their meaning, and in that view the underwriters are also exempt. First, the defendant is exempted by the warranty. "Mortality" means not only natural death, as by disease or age, but violent death, as by force, or by an accident such as that in the present case; these horses therefore died a natural death, and this was a loss by mortality, within the meaning of the warranty. For this construction, the cases of *Tatham* v. *Hodgson* (c) and *Gregson* v. *Gilbert* (d), and the statutes 30 *Geo.* 3. c. 33. s. 8. and 34 *Geo.* 3. c. 80. s. 10. are authorities. Secondly, the usage found is evidence to explain and control the policy, and, as such, is an answer to this action. It is a usage universally adopted at *Lloyd's*, where the great majority of policies entered into by the citizens of *London* are effected. This policy was effected there, and according to the usage there prevailing; the plaintiffs, being parties to it, were bound to know, and in the absence of proof to the con-

(a) 2 Bos. & Pul. 164.
(b) 4 East, 120.
(c) 6 T. R. 656.
(d) Park's Insurance, 69.

1825.

GABAY v. LLOYD.

trary, must be presumed to have known, the existence of that usage; and the usage, whether specifically known to them or not, must be held, in point of law, to govern every policy effected in the place where it prevails. *Mason* v. *Murray* (*a*), and *Pelly* v. *The Royal Exchange Insurance Company* (*b*). [*Bayley*, J. Is there not a case of a somewhat contradictory tendency from these? *Cooking* v. *Frazer* (*c*).] It does not vary from them in general principle, and there are many others that shew, that the usage here found must be allowed to control and explain the policy, and that the loss, in this case, is one which neither of the contracting parties ever intended to fall upon the underwriters. *Lily* v. *Ewer* (*d*), *Long* v. *Allen* (*e*), *Noble* v. *Kennoway* (*f*), *Ougier* v. *Jennings* (*g*), *Vallance* v. *Dewar* (*h*), and *Palmer* v. *Blackburn* (*i*).

Park, in reply, was stopped by the Court.

ABBOTT, C. J.—I am of opinion, that the usage found in this case is not sufficient to take it out of the general rule laid down in *Lawrence* v. *Aberdein* (*k*). The special verdict is a finding rather of that which might have been evidence of the usage, than of the usage itself; and however general the usage may be, there is nothing to shew that the plaintiffs had any knowledge of it, or intended to contract with reference to it. This case, therefore, appears to me not distinguishable from *Lawrence* v. *Aberdein*, and as that was fully considered, and I, for one, see no reason to change the opinion which I there delivered, I think it unnecessary to say any more on the present occasion. The postea must be delivered to the plaintiffs.

BAYLEY, J.—The precise meaning of the word mortality,

(*a*) Park's Ins. 131. (*b*) 1 Burr. 341. (*c*) Park's Ins. 129.
(*d*) Doug. 72. (*e*) Park's Ins. 446. (*f*) Doug. 570.
(*g*) 1 Camp. 505. (*h*) Id. 503.
(*i*) 7 J. B. Moore, 339. 1 Bing. 61. S. C. (*k*) 5 B. & A. 107.

as used in this policy of insurance, it might be difficult to define; but, upon general principles, I am satisfied, that the construction put upon it in the late case of *Lawrence* v. *Aberdein* is the just and sound construction, and therefore, that the present case must be governed by that decision. If there had been evidence to shew, that the usage relied on by the defendant was universally adopted throughout the city of *London*, by all parties effecting insurances there, and that the plaintiffs were acquainted with it; then the usage here might have been receivable to explain the policy, and the whole case might have assumed a different complexion. But there was no such evidence; for the usage found extends no farther than *Lloyd's* Coffee-house, and certain private individuals accustomed to effect policies there, and it is not even found that the plaintiffs knew of that usage, or were in the habit of effecting policies at that place. Such a usage can neither control the policy, nor bind the party insured by it; there is, consequently, in my opinion, no answer to this action.

HOLROYD, J.—I am entirely of the same opinion.

LITTLEDALE, J.—The usage found by this verdict to prevail at *Lloyd's* cannot possibly affect any other persons than those who frequent that place, and are familiar with that usage. The plaintiffs are not shewn to be persons answering that description, therefore the usage cannot bind them. With respect to the construction of the word mortality, I must say I have some doubt, whether I should have concurred in the decision in *Lawrence* v. *Aberdein* on that point, but assuming that case to be law, I think the present cannot be distinguished from it.

Postea to the plaintiffs.

1825.

POUCHER v. NORMAN.

A certificated conveyancer may maintain an action for his fees.

DECLARATION in assumpsit upon a promissory note, and for work and labour. Plea, non assumpsit, with notice of set-off. At the trial before *Alexander*, C. B. at the last *Cambridge* summer assizes, the plaintiff proved the defendant's execution of the promissory note, and also business done by him for the defendant as a conveyancer; and the defendant proved a set-off. It also appeared that the plaintiff was neither a barrister nor an attorney, but that he had taken out his certificate, pursuant to the statute 44 *Geo.* 3. c. 98. s. 14. It was, nevertheless, objected that the plaintiff could not recover upon the count for work and labour for the business done as a conveyancer; and the Lord Chief Baron, being of that opinion, told the jury that the plaintiff was not by law entitled to recover any thing in respect of his claim for business done as a conveyancer, directing them to find a verdict either for the plaintiff or the defendant, according as they should think upon the evidence that the amount of the promissory note was greater or smaller than that of the set-off. The jury found for the defendant. In *Michaelmas* term last a rule nisi for a new trial was obtained upon two grounds, first, that the learned judge, in telling the jury that the plaintiff could not recover for business done as a conveyancer, had misdirected them in point of law, and, second, that the verdict was against evidence. The learned judge reported to the Court that, in his opinion, the verdict was against the evidence.

Storks now shewed cause against the rule, and relied upon *Jenkins* v. *Slade* (a), in which it was held by *Best*, C. J. at nisi prius, that a certificated conveyancer could not maintain an action for his fees.

(a) 1 Carrington's Reports, 270.

Dover, contrà, was stopped by the Court.

1825.

POUCHER *v.* NORMAN.

BAYLEY, J.—The rule for a new trial in this case must be made absolute One portion of the plaintiff's claim was entirely withheld from the view of the jury, for the Lord Chief Baron told them that the plaintiff could not maintain any action in respect of the business done by him as a conveyancer. In that direction the learned judge was clearly mistaken. There is no reason that I can suggest to my mind why a conveyancer should labour under such a disability. The general rule of law is, that every man who devotes his labour, his talents, or his time to the service of another, shall be entitled to a recompense. To that rule there are two exceptions, namely, barristers and physicians. The principle upon which they are excepted is, that their professional occupation is quiddam honorarium, that they act not upon any mercenary feeling, but with a view to an honorary reward. A conveyancer does not come within that principle, he stands in the same situation as a surgeon or an attorney. If a conveyancer could not recover for work and labour done, he would be in a condition of great hardship; for, from the very nature of his business, he cannot anticipate the amount of his fees and stipulate for their payment accordingly, and therefore the consequence would be that, in many instances, he would receive no remuneration at all.

HOLROYD, J.—It is quite clear that a conveyancer who is not at the bar, may maintain an action to recover a compensation for business done. He has the same ground of action which the law gives to every man, with the exceptions already pointed out, who performs a service for another. Persons practising in the subordinate degrees even of the excepted professions may recover for their services; surgeons may recover for skill and attendance, and attornies for conveyancing. There is therefore nothing to place a certificated conveyancer, not at the bar, in a different situation from an attorney practising as a conveyancer, or to take

1825.

POUCHER v. NORMAN.

him out of the general rule both of law and justice, that every man should be entitled to recover a recompense for the devotion of his labour for the benefit of another.

LITTLEDALE, J. concurred.

Rule absolute.

DOE, on the Demise of THOMAS COLCLOUGH and ALICE his Wife, v. HULSE.

M. M. seised in fee of an undivided moiety of an estate, by her will, made many years before her death, devised the same to her nephew and two nieces, as tenants in common. One of her nieces having died in her life-time leaving an infant daughter, *M. M.* by another will, but which she never executed, devised the estate to her nephew, her surviving niece and that infant. Upon the death of *M. M.*, her nephew and surviving niece by deed covenanted to carry her unexecuted will into effect, and to convey one-third of the estate to a trustee, to convey to the infant when she reached twenty-one, or to her issue if she died before twenty-one leaving any, or otherwise to themselves again: but no conveyance was ever executed in pursuance of the deed. The infant died under age and without issue, but the rents were received by her trustee for her use during her life. In ejectment by the devisee of the nephew, brought above twenty years after the death of the nephew, but within twenty years after the death of the infant:—Held, that the adverse possession began only after the latter event, and therefore that the action was maintainable.

EJECTMENT. The declaration was entitled of *Michaelmas* term, 4 *Geo.* 4. and the demise was laid on the 2d of *December*, 1817. At the trial before *Littledale*, J. at the last *Staffordshire* summer assizes, the case was this: Mrs. *Colclough* was the widow of *William Booth*, who died in *April*, 1803, having devised all his estates real and personal to his wife for life, and the property in question was now claimed by her as parcel of that real estate. *William Booth* was the nephew of *Mary Mason*, who was seised in fee under the will of her father, *Thomas Mason*, of an undivided moiety of his real estate, and who died on the 17th of *December*, 1793, having by will devised her moiety to *William Booth*, *Ann Booth*, and *Sarah Bill*, formerly *Booth*, the three children of her sister *Margaret Booth*, as tenants in common. *Sarah Bill* died in the lifetime of *Mary Mason*, who thereupon made another will, by which she devised her moiety to *William Booth*, *Ann Booth*, and *Sarah Bill*, the infant daughter of *Sarah Bill*, formerly *Booth*; but this will she never executed. By deed, bearing date the 11th of *January*, 1794, and made between *William*

Booth and *Ann Booth*, reciting the unexecuted will of *Mary Mason*, they, in pursuance of, and obedience to, the intention of *Mary Mason*, covenanted for themselves, their heirs, executors, and administrators, and to and with each other, that the unexecuted will of *Mary Mason* should be established, carried into effect, and confirmed; and that they would at any time thereafter grant, convey, and assign the estate of *Mary Mason*, one third part to *William Booth*, his heirs, &c. one other third part to *Ann Booth*, her heirs, &c. and the remaining third part to *Thomas Bill*, his heirs, &c. upon trust to convey, assure and assign that third part to *Sarah Bill*, for her sole and separate use and benefit, at her age of twenty-one years, or unto her issue in like manner in case she should die before that age leaving issue, and in case she should die before that age without issue, then to convey that third part to *William Booth* and *Ann Booth*, share and share alike, as tenants in common and not as joint tenants. No conveyance was ever executed in pursuance of this deed, but *William Booth* afterwards sold his third part of the moiety to persons who subsequently resold it to *Ann Booth*, whereby she became possessed of two third parts of the moiety. *William Booth* died on the 25th of *April*, 1803, having, by will, devised all his real estate to his wife *Alice Booth* for life, and after her death to his son *Hugh Booth* and his daughter *Alice Booth*, equally to be divided between them, as tenants in common. *Sarah Bill*, the infant daughter of *Sarah Bill*, formerly *Booth*, died on the 2d of *December*, 1804, her father, *Thomas Bill*, having died in her lifetime. Mrs. *Colclough* never received any part of the rents of the property in question, but they were received during the life of *Thomas Bill* by him and *Ann Booth*, and after his death by *Ann Booth*, who upon *Hugh Booth's* coming of age accounted to him for a part. *Hugh Booth* sold the property in question to the defendant, and suffered a recovery and levied a fine as of *Trinity* term, 1822; but Mrs. *Colclough* made an entry for the purpose of avoiding the fine on the 21st of *October*, 1823. An ob-

1825.
DOE
v.
HULSE.

jection was taken at the trial on the part of the defendant, that as neither the lessor of the plaintiff, nor the parties under whom he claimed, had received any of the rents for a period of twenty years, his title was barred. The learned judge, being of opinion that the objection was well founded, directed a nonsuit, giving the plaintiff liberty to move to enter a verdict in his favour, and a rule nisi having in *Michaelmas* term last been obtained accordingly,

W. E. Taunton now shewed cause. The one third part of *Mary Mason's* moiety, devised to her niece *Sarah Bill*, became by the death of the devisee a lapsed devise, and, consequently, descended to *William Booth*, the heir at law of the devisor. From that time *William Booth* was seised of two third parts, and *Ann Booth* of the remaining third part of that moiety. They, being so seised, covenanted to carry into effect the unexecuted will of *Mary Mason*, and to convey one third part to a trustee for the use of the infant *Sarah Bill*; but they never executed any such conveyance. The legal estate, therefore, in that third which was so intended to be conveyed to a trustee for the use of the infant *Sarah Bill*, remained in *William Booth* during his life, and at his death, in 1803, passed under his will to his wife for her life. But she never took possession of that one-third, for the rents were received by *Ann Booth*, who accounted for them to the trustee of the infant *Sarah Bill* during her life; so that the title of *Alice Booth*, the wife of the lessor of the plaintiff, accrued in 1803, more than twenty years before this ejectment was brought. Her title, therefore, is barred, and the plaintiff cannot recover.

Campbell, contrà. There was no adverse possession in this case. *Ann Booth* was indeed in the possession of the one-third part, and in the receipt of the rents, during the life of the infant *Sarah Bill*; but that possession and receipt were by the permission, first, of *William Booth*, and afterwards of his widow, and were perfectly subordinate to, and

consistent with, their respective titles. *William Booth*, and after his death his widow, was bound by covenant to allow the rents to be received by the trustee of the infant *Sarah Bill* for her use; and though the legal estate may have been in *William Booth*, the equitable estate was clearly in the infant *Sarah Bill*, and a court of equity would have compelled *William Booth* and *Ann Booth* to execute a conveyance to a trustee for her use. In any view of the case the rents were properly received by *Ann Booth* during the life of the infant *Sarah Bill*, and as she did not die till *December*, 1804, the title of Mrs. *Colclough* was not twenty years old when this ejectment was brought.

BAYLEY, J.—I am of opinion that there was not any adverse possession in this case for such a period of time as would bar the right of the plaintiff to recover in ejectment; because it seems to me that the adverse possession began to run only from the death of the infant *Sarah Bill*, on the 2d of *December*, 1804. After *William Booth* and *Ann Booth* had agreed by deed to carry into effect the unexecuted will of *Mary Mason*, *William Booth* had no right to appropriate to himself any of the rents and profits arising from the one third part which was the subject of the deed; because by the terms of the deed he had covenanted that those rents and profits should go to the separate use of the infant *Sarah Bill*. Upon the death of *Sarah Bill*, under age and without issue, the interest created by the deed for the benefit of herself and her issue, determined; and the one third part, which was the subject of the deed, then passed, one moiety of it to *Ann Booth*, and the other moiety, which would have reverted to *William Booth* if he had then been living, passed under his will to his widow, the wife of the lessor of the plaintiff. That it would have passed to *William Booth* if he had been living is clear, for he had a vested interest in it, notwithstanding the deed, expectant upon the death of *Sarah Bill*, under age and without issue; and that interest passed to his widow under his will. I am, consequently, of

opinion that the lessor of the plaintiff is entitled to recover for that share, which will be one-sixth part of the moiety

Holroyd, J. and Littledale, J. concurred.

Rule absolute.

Jones v. Williams.

A charter provided, that there should be two aldermen in the borough of *D.* who should act for one year, by themselves, *or their deputies;* that on their death or removal, other aldermen should be elected, who should act for the rest of the year, by themselves, *or their deputies;* that in the absence of the aldermen, new aldermen might be elected in their room; and, that the aldermen for the time being should be justices of the peace for the borough:— Held, that the deputy of an alderman was not a justice of the peace for the borough.

Semble, that since the 27 *H.* 8. c. 24. s. 2., the king cannot delegate the power of making a justice of the peace.

TRESPASS for an assault and false imprisonment. Plea, not guilty, and issue thereon. At the trial before *Park*, J. at the *Salop Summer* Assizes, 1824, the case was this:

The plaintiff, having withdrawn from her service with one *Hughes*, in *Denbigh*, before the expiration of the year for which she had agreed to serve, was convicted of that offence under the 4 *G.* 4. c. 34. s. 3. by the defendant, who acted as the deputy of one *John Copner Williams*, an alderman of the borough of *Denbigh*, and by him committed for one month to the house of correction at *Ruthin*, within the borough of *Denbigh*. The plaintiff having proved this case, it was objected on the part of the defendant that the plaintiff had not given the notice of action required by the 24 *G.* 2. c. 44. s. 1., and the question arose whether the defendant was a justice of the peace for the borough of *Denbigh*, and as such entitled to notice. The charter of the borough being produced, was found to contain a grant that the aldermen, bailiffs, and capital burgesses of the borough, for the time being, or the major part of them, of which one of the aldermen and one of the bailiffs should be two, being assembled from time to time, might and should have power and authority yearly, on &c. to elect two, out of the number of the burgesses of the borough, who should be aldermen of the said borough for one whole year, then next ensuing; that they, after they were so elected and nominated aldermen

of the borough, should take the oaths before the steward or his deputy; or, if there were no steward at the time of such election and nomination, then before their immediate predecessors, and in the presence of ten capital burgesses of the said borough, for the time being, to execute their office well and faithfully; that they should have power and authority to execute by themselves, *or, in their absence, by their deputies*, the offices of aldermen of the said borough, for one whole year, then next ensuing, and until some other should in due form be elected and sworn into the offices of aldermen; that if it should happen that either of the aldermen of the borough for the time being should die, or be displaced from his office, that then and so often it should be lawful for the surviving aldermen, and the bailiffs and capital burgesses of the borough for the time being, or the major part of them, to elect or place in another of the number of the burgesses of the said borough, for alderman of the said borough; and that he, being so elected and placed in, might and should have and exercise the said office for the remainder of the said year, and until one or more were duly chosen and sworn to the said office, (the corporal oaths to be so first taken in form aforesaid,) by himself or themselves, or his or their deputies, in his or their absence.—Proviso, that the aldermen, bailiffs, and burgesses, of the said borough, or the major part of them, from time to time, and at all times thereafter, should and might have power and authority to elect and nominate, and that they should and might elect, the welfare of the said borough requiring it, and when it should be necessary and requisite, out of the number of the capital burgesses of the borough aforesaid, one or two other alderman or aldermen, in the absence of the other alderman or aldermen and bailiffs, or one or more of them, any thing to the contrary in any wise notwithstanding; and that he, or they, after they were so elected and nominated, as aforesaid, to be alderman or aldermen of the borough aforesaid, should take, as aforesaid, their corporal oaths, in due form, that they would execute their offices well and

1825.
JONES
v.
WILLIAMS.

faithfully, so long as he or they should continue in the same. The charter then contained a clause constituting the aldermen of the borough, for the time being, while they remained in office, keepers and justices of the peace in the said borough, liberties and precincts of the same, &c.; and a non-introwittant clause; and it then concluded by naming the first aldermen, &c. In reply to this document, it was urged on the part of the plaintiff, first, that the crown could not delegate to a subject the power of creating a justice of the peace; and, second, that even if it could, still the words of this charter did not amount to any such delegation; the charter merely empowered the aldermen to execute by themselves, or their deputies, that particular office of alderman of the borough, and though it certainly did superadd the office of justice to that of alderman, still the former was and must remain a separate and distinct office, and the alderman could not appoint a deputy justice, although he might appoint a deputy alderman. The learned judge, however, thought that as one part of the charter empowered the aldermen to appoint deputies, and another part constituted the aldermen justices of the peace, both those parts must be read with reference to each other, and construed as giving to the aldermen power to appoint deputies to do all that they themselves had power to do under the charter; therefore that the defendant being a deputy alderman, was also a deputy justice, and as such entitled to notice of action. His lordship therefore directed a nonsuit.

Godson, in *Michaelmas* Term last, obtained a rule to shew cause why the nonsuit should not be set aside, and a new trial had. He made two points; first, that the crown could not by charter, or otherwise, delegate to any subject the power of making a justice of the peace, or any judicial officer; and, consequently, that no justice of the peace, or other judicial officer, had power to appoint a deputy; and second, that even if the crown could delegate such a power, the words of this charter were insufficient to express such a

purpose. First, such a delegation would be equally unconstitutional, whether as respects the rights of the subject, or the prerogative of the crown. The king is the fountain of justice, and in his hands the power of creating magistrates and other judicial officers is safely and becomingly placed; but it would be neither safe nor proper that justices themselves, who might be swayed by various improper motives, should have a similar power. On this point he cited *Com. Dig. Officer*, D. 2., Id. *Justices*, A. 1., 27 *H.* 8. c. 24. ss. 2. 6., and *Rex* v. *the Mayor of Gravesend* (a). Second, even if the king could empower a justice to appoint a deputy, he clearly could not do so, except by the most clear, express, and unequivocal words, and there are none such in this charter. Without express words to that effect, it by no means follows that an alderman is also necessarily a justice of the peace; *Rex* v. *Langley*; (b) and in all such appointments it has always been held necessary that express words should be used, 4 *Inst.* 88. These deputy justices are quite superfluous in the borough, because the proviso in the charter authorises the election of new aldermen in the absence of those annually elected under the charter; the borough therefore would sustain no inconvenience, and the Court will, if possible, repress a practice so dangerous and unconstitutional.

W. E. Taunton and *Campbell* now shewed cause. The alderman, under whom the defendant acted, had by the charter authority to appoint a deputy generally, which must mean a deputy to discharge all the functions which the principal himself had previously discharged. The charter constitutes two of the burgesses aldermen and justices of the peace for the borough, and no more; and it contains a non-intromittant clause. Then, if the argument on the other side is to prevail, whenever those two aldermen are absent from the borough, great inconvenience will arise from the utter defect of justice, for there will be no individual within

(a) Ante, vol. iv. 117. (b) 2 Ld. Rd. 1029

1825.
JONES v. WILLIAMS.

the borough qualified to act as a justice of the peace. It must be admitted that without express authority for the purpose, no judicial officer can appoint a deputy; but here there is such express authority. The charter declares that the aldermen shall have power and authority to execute by themselves, or, in their absence by their deputies, the offices of aldermen of the borough. What are their deputies to do? They are to act quà aldermen, and to exercise in their persons all the duties and powers which would otherwise be exercised by the aldermen themselves. Had that clause of the charter which constitutes the aldermen justices of the peace for the borough preceded that which empowers the aldermen to appoint deputies, there would have been no room for argument on the point, for it would have been clear beyond a doubt that the deputies would have been good justices of the peace; and if so, how can a directly contrary intention be fairly presumed from the mere transposition of these clauses? The deputies are to act as aldermen, and the acting as a justice of the peace is, by the charter, part and parcel of the duty of an alderman. It is a general rule that every officer who may assign his office may also appoint a deputy; and when an office is given to be held per se vel deputatem, the power to make a deputy is necessarily and impliedly given also. *Com. Dig. tit. Officer, D.* 2. and *Molins* v. *Worley*(a). It is also a general rule that a deputy once appointed is invested with all the attributes which before belonged to his principal; and it has been held that the principal cannot legally divide, or parcel out the duties of his office, but that if he delegates any part of his office, he must delegate the whole: and therefore that a covenant by a deputy not to perform that which his principal could perform was repugnant and void. *Com. Dig. tit. Officer, D.* 3. and *Parker* v. *Kett*(b). That rule must decide the present case in favour of the defendant, for by being appointed deputy to an alderman who was a justice of the peace, he became not only an alderman but a

(a) 1 Lev. 76. (b) 1 Salk. 96.

justice of the peace also; he is within the statute and entitled to notice of action, which not having been given, the action cannot be maintained. The nonsuit consequently was strictly correct, and this rule must be discharged.

1825.
Jones v. Williams.

Godson, in support of the rule. The inconvenience and defect of justice pointed out on the other side are completely removed by the proviso in the charter, which enables the bailiffs and burgesses, in the absence of the aldermen for the time being, to elect others in their room. The aldermen thus elected are to be sworn before they are admitted to execute the office, a ceremony which is not required of the deputies; so that if the argument for the defendant is correct, this monstrous absurdity follows, that the persons who are to fill the most important office of alderman and justice of the peace, jointly, need not be sworn to their good behaviour, while those who fill the less important office of alderman only, must be. Lord Chief Baron *Comyns* is cited as an authority to shew that such officers as may assign their offices may also appoint deputies; but the principle, however just, does not apply here, for a justice of the peace cannot assign his office. The relative position of the two clauses in the charter, as pointed out by the other side, is most important, and shews most clearly the intention of the crown to have been, that the deputies should represent and act for their principals so far as their character and office of alderman went, and no farther; in a word, that they should be deputy aldermen, but not deputy justices of the peace. *Parker* v. *Kett*, therefore, does not govern this case, because that was an appointment of a deputy generally, and for all purposes, whereas here by the very frame of the charter the aldermen have only a qualified power of appointing a deputy, in a particular character and for a particular purpose. The main argument, however, is, that both by the law and constitution of the country, none but the king has, or can acquire the power of making a justice of the peace; this was the argument relied on when this rule

1825. was moved for, and no substantial answer has been given to it. (Here the Court stopped him.)

JONES v. WILLIAMS.

BAYLEY, J.—The question in this case turns partly on the prerogative of the crown to delegate to a subject the power of making a man a justice of the peace, and partly on the construction of the charter. Assuming that the crown has such a prerogative, a charter professing to effect so serious an object ought at least to express its intention in clear and unambiguous terms. The present inclination of my opinion is, that since the statute, 27 H. 8. c. 24., the crown has ceased to enjoy this prerogative. That statute enacts in section 2, " that no person shall have any power or authority to make any justices of eyre, justices of assize, justices of peace, or justices of gaol delivery; but that all such officers and ministers shall be made by letters patent under the king's great seal, in the name and by the authority of the king's highness, and his heirs, kings of this realm, in all shires, counties, counties palatine, and other places of this realm, *Wales*, and marches of the same, or in any other his dominions, at their pleasure and wills, in such manner and form as justices of eyre, justices of assize, justices of peace, and justices of gaol delivery, be commonly made in every shire of this realm; any grants, usages, prescriptions, allowances, act or acts of parliament, or any other thing or things to the contrary thereof notwithstanding." Then in section 9 there is a proviso, " that all cities, boroughs and towns corporate, which have liberty, power and authority to have justices of peace, shall still have and enjoy their liberties and authorities in that behalf after such like manner as they have been accustomed, without any alteration by occasion of this act." There is no section in the act relating to corporations thereafter to be created, but the words are undoubtedly very general; and considering the power vested in justices of the peace, and the integrity as well as talent necessary to the due and beneficial discharge of their duties, it is plainly for the in-

terests of society, not only that they should be carefully selected, but that the selection should be made by the highest and most capable authority. Lord Chief Baron *Comyns* lays it down, that none but the king can make justices of the peace, and cites *Dalton*, s. 10, as his authority; and adds, that the king cannot grant to another the power of making them (*a*). The recorder of *London*, and the justices of great sessions in *Wales*, have no doubt the power of appointing deputies; but that is only for certain specific purposes, and is besides by virtue of an act of parliament: and the charter of *London*, which declares that the recorder shall execute his office by himself or his sufficient deputy, is confirmed by statute. By the 34 and 35 *H.* 8 c. 26, the *Welch* judges were empowered to execute their offices by themselves, or their sufficient deputies; but by the 13 *G.* 3. c. 51. s. 3, that privilege is now confined to certain specific purposes therein mentioned. But, admitting for the moment that the king can empower a subject to invest a fellow subject with the office of justice of the peace, still, considering the language of this charter, I cannot find that he has there expressed his intention so to do. The relative position of the clauses, as pointed out in argument, is very material to guide our judgment. The first enacts, that the aldermen, bailiffs and capital burgesses, for the time being, shall have power yearly to elect two of the burgesses who shall be aldermen of the borough for one year next ensuing, and who, after they are so elected aldermen, and before they are admitted to execute that office, shall take the oaths before the steward, or if there be no steward, before their predecessors and ten burgesses, to execute their offices faithfully; and that, when they have been so sworn, they shall have power to execute by themselves, or in their absence by their deputies, the office of alderman of the borough for one year next ensuing. Now by that clause the deputies are only empowered to act as aldermen; but the duties and powers of aldermen differ materially in different boroughs,

(*a*) Com. Dig. tit. Justice of the Peace.

1825.
Jones
v.
Williams.

and it by no means follows that he who has the powers of an alderman, has also for that reason the powers of a justice of the peace. There is then a clause empowering the making of new aldermen in case of the death or removal of those elected for the year; and those new aldermen are to be sworn, and to execute the office by themselves or their deputies. Then comes the proviso for the election of other aldermen to act in the absence of the former; but that does not give to such other aldermen the power of appointing deputies. So that there are two species of aldermen described, namely, those originally elected for a year and those afterwards elected upon their death or removal, all of whom have the power of appointing deputies; and those elected in the absence of those originally elected for a year, who have not the power of appointing deputies. The charter then declares that the aldermen for the time being, while they remain in office, shall be justices of the peace for the borough, but it no where says that their deputies shall be justices also. Indeed the charter in two other particulars takes an important distinction between the aldermen and their deputies, for the aldermen are required to be sworn, which their deputies are not; and the aldermen must be selected from among the burgesses, which their deputies need not. The inference arising in my mind upon this consideration of the charter is, that as the aldermen were clearly intended to act as justices, their deputies were as clearly intended to be excluded from so doing. And such a distinction is consistent with propriety and justice, for as the deputies need not be members of the corporation, an alderman might, if mischievously, or even negligently disposed, appoint his own menial servant, or any other equally unsuitable person; and the consequences to the public might be very injurious, for as the deputies are not required to be sworn, there would be no check upon their conduct: nor can any inconvenience arise, because as there is a power of electing new aldermen in case of the absence of the original aldermen, and as those new aldermen would be empowered to

act as justices, no defect of justice can take place, and the language as well as the object of the charter will be fully satisfied. For these reasons I am of opinion that the nonsuit was wrong, and that the rule for a new trial ought to be made absolute.

HOLROYD, J.—I am of opinion that the defendant, as the deputy of an alderman, was not invested either with the office or the power of a justice of the peace. The charter appoints two particular persons justices for the borough, so to continue till others are appointed in their stead; and though it annexes thereby the office of justice to that of alderman, it does not follow that the former becomes part and parcel of the latter. An alderman has not, virtute officii, the power of appointing a deputy, as a sheriff, and some other public officers have; nor do I know that an alderman has, virtute officii, or quà alderman, any known duties to perform; his duties and his powers are generally defined in the charter from whence his official existence springs. The powers of an alderman are corporate powers only, and can be exercised only on members of the corporation, but the powers of a justice are not bounded by the corporation, but are much more extensive both in their nature and operation. Then where an alderman has by his charter power to appoint a deputy, the latter will have all the powers of the former, that is, all his corporate powers, for those only can he transfer; but that is essentially different from the present case, because here the office of justice is annexed to that of alderman, and does not make part of it. I think, therefore, that the intention expressed by this charter is, that the deputies shall act as aldermen only; but at all events, considering that the general power of making justices is vested exclusively in the crown, it seems to me that there certainly are not words so clearly expressive of an intention to delegate that power, even if it can be delegated, which I doubt, as to justify us in holding that

1825. JONES v. WILLIAMS.

the defendant is in the eye of the law a justice of the peace. I agree therefore that the rule for a new trial must be made absolute.

LITTLEDALE, J. concurred.

Rule absolute.

The EARL of FALMOUTH v. RICHARDSON and another.

By the general inclosure act, 41 *G.* 3. c. 109. s. 10., commissioners are empowered to set out private roads, which, when set out, are to be *made* and kept afterwards in repair *at the expense of the owners and proprietors* of the lands inclosed:—Held, that commissioners who had *made* private roads under the authority of that and a private inclosure act, (which said nothing about *private* roads,) had no power to make a rate for reimbursing themselves the expense incurred.

THIS was an action of trespass against the defendants as commissioners under a private inclosure act, for seizing the plaintiff's goods, as a distress for a rate. The defendants justified the alleged trespass under a private inclosure act, 51 *Geo.* 3. c. 100., for inclosing lands lying in several parishes and townships, and also under the general inclosure act, 41 *Geo.* 3. c. 109., and pleaded, that, by sec. 54 of the private act, it was enacted " that as well the fees and payments to the commissioners, as also the charges and expenses incident to and attending the soliciting, obtaining and passing of the said act, and of the surveying, planning, dividing, allotting, and inclosing of the said open and common fields, lands, &c., and of preparing, making, and depositing the awards of the said commissioners, and of all other plans, maps, &c. directed by the commissioners to be prepared and made out, and all other costs, charges and expenses whatsoever, in anywise attending the execution of that and the general inclosure act, or any of the powers, authorities, provisoes or declarations therein contained, should be borne and defrayed at such times as the said commissioners should by any writing or writings under their hands, to be affixed, &c. (in certain places and at certain specified times) order and direct, but subject to the regulations, proportions and restraints thereinafter mentioned, that is to say, that so much of the said costs, charges and expenses as should be incurred previous to and up to the time of the passing of the act, and

all other costs, charges and expenses as should thereafter be incurred, which should relate to or affect the said parishes and townships jointly, should be paid by the several proprietors of estates and other persons within the said several parishes and townships respectively, to whom allotments should be made by virtue of that act, in proportion to the value of the lands to be allotted to them respectively, to be ascertained by the said commissioners; and that from the time of the passing of that act, the commissioners should keep a general account of all costs, charges and expenses, jointly affecting the said parishes and townships; and also a separate account of all costs, charges and expenses separately relating to or affecting the said parishes and townships; which last mentioned costs, charges and expenses should be paid by the proprietors of estates and other persons in the said parishes and townships, respectively, to whom allotments should be made by virtue of that act, in proportion to the value of the lands to be allotted to them respectively, to be ascertained by the said commissioners; and in case any person or persons should refuse or neglect to pay his, her or their share or proportion of such charges or expenses within the times, and to such person or persons as the said commissioners should appoint, then and in such case the said commissioners should cause the same to be levied and recovered in manner directed by the said recited act." Averment, that the commissioners had set out certain private roads pursuant to the general highway act, s. 10., and afterwards made their award, whereby they directed that certain persons should bear the expense of making and keeping those roads in repair; that the commissioners afterwards made a rate for that purpose, and because plaintiff refused to pay his share and proportion thereof, defendants, as such commissioners, issued their warrant and distrained his goods for the same. To this plea, plaintiff replied that the rate was made for the sole purpose of defraying the expenses of making the said private roads, so set out and appointed as aforesaid, in meadow *W*. (part

1825.

The Earl of Falmouth v. Richardson.

of the lands directed by the act to be inclosed,) and that the rate was solely and exclusively made upon the owners of land in that meadow. Defendants rejoined, that making the private roads was part of the costs and charges attending the execution of the general inclosure act and the said private inclosure act. To this rejoinder there was a demurrer, and joinder in demurrer.

Campbell, in support of the demurrer. The question raised on these pleadings depends solely upon the construction to be given to section 10 of the general inclosure act, by which it is enacted "that the commissioners shall set out and appoint private roads, and that the same shall be made, and at all times for ever thereafter be kept in repair by and at the expense of the owners and proprietors for the time being of the lands to be divided and inclosed, in such proportions as the commissioners shall by their award order and direct." In the private inclosure act in question, there is nothing to be found which at all relates to the making of private roads, and consequently the commissioners have no authority to make a rate for defraying the expense of making such roads. It is true that, by the 54th section of the private inclosure act, power is given to them to raise money for the payment of their own expenses and of all costs, charges and expenses whatsoever attending the execution of that act, and of the general inclosure act; but if the making of private roads be not within the scope of their authority, they can have no power to make a rate for that purpose. Making private roads cannot be said to be any thing done in the execution of the private act, and therefore the rate in respect of which this trespass was committed, is illegal, and the distress not justifiable. On this short ground the plaintiff is entitled to the judgment of the Court.

W. E. Taunton, contrà. The simple question is, whether the expense of making the private roads in this case,

was incurred in execution of the private, or of the general inclosure act. If in execution of the latter statute, the plaintiff is entitled to judgment; if the former, the defendants. Now, by sec. 10 of the general inclosure act, the commissioners are to set out the private roads, and to direct by whom and in what manner they are to be made. Until the roads are actually made, it cannot be said that the power given to the commissioners is fully executed. The expense, therefore, of making the roads, is an expense incurred in the execution of the powers given by that section, and if so, then it follows that the defendants, as commissioners, had authority to make the rate in question. It has been held, that the commissioners have authority to levy a rate for defraying the expense of making roads under the powers given by the general inclosure act; *Haggerstone* v. *Dugmore* (a). In that case, it is true, that the expense was incurred in making public roads; but in principle there is no distinction, for the present purpose, between public and private roads. They stand on the same footing.

BAYLEY, J.—Mr. *Taunton* has put this case upon the true ground. The question is, whether the expense of making the private roads in question was incurred in execution of the powers of the local act, 51 *Geo.* 3. c. 100. or of the general inclosure act, 41 *Geo.* 3. c. 109. It is clear that the former act makes no mention of private roads, and therefore we are to see whether the general inclosure act gives these commissioners power to make private roads. Whatever their authority is, it is given by the 10th section. By the 9th section the commissioners, before making any allotments, are to appoint public carriage roads, and prepare a map thereof, to be deposited with their clerk, and give notice thereof, and appoint a meeting; at which, if any person shall object, the commissioners, with a justice of the division, shall determine the matter. By the 9th sec-

(a) 1 B. & A. 82.

1825.

The EARL of FALMOUTH v. RICHARDSON.

tion the commissioners are to appoint surveyors, and if with a salary, such salary and the expenses of making the roads, over and above the statute duty, shall be raised as other expenses, and paid on or before the execution of the award. Then follows the 10th section, which authorises the commissioners to appoint private roads, &c. It enacts that "such commissioner or commissioners shall set out and appoint such private roads, &c. as he or they shall think requisite, giving such notice and subject to such examination as to any private roads or paths, as are above required in the case of public roads; and the same shall be made and at all times for ever thereafter be kept in repair at the expense of the owners and proprietors, for the time being, of the lands and grounds directed to be divided and inclosed, in such shares and proportions as the commissioner or commissioners shall by his or their award direct." Here is no power given of appointing a surveyor as in the case of public roads, or of raising money to pay for the making of private roads. On the contrary, they are expressly directed to be made by the owners of the allotments, and at their own expense. It is quite obvious that no rate could be made by the commissioners for future repairs, for the words "making and repairing," are put conjunctively. It appears to me, therefore, that the defendants, as commissioners, were not acting in pursuance of their authority when they made the rate in question, and therefore the plea is no answer to the action.

HOLROYD, J. concurred (a).

Judgment for the plaintiff.

(a) *Littledale*, J. was absent.

1825.

The King v. Soper, Camfield, Stevens, Martin, Dight, Robinson, Chambers, and Aries.

The 33 *Geo.* 3. c. 54. s. 15., which authorises justices, on complaint made on oath by any member of a friendly society, "to hear and determine in a summary way the matter of such complaint, and to make such order therein as to them shall seem just," gives them no jurisdiction beyond the actual matter of *the* particular complaint made. Therefore, where a sick member complained that the stewards refused to pay him his arrears of allowance, and the justices ordered that the arrears and costs should be paid, *and that the complainant should be continued a member*:—Held, that the justices had exceeded their jurisdiction in making the latter part of the order, and that the stewards were not bound to obey it.

INDICTMENT stated that, before and at the time of making the order after mentioned, a certain friendly society, called "The Society of Brotherly United Philanthropists," had been and now is existing at *Greenwich*, in the county of *Kent*, by virtue of a certain act of parliament passed in 33 *Geo.* 3. c. 54. entitled, &c. the rules, orders and regulations of which society, before the making of the said order, had been and were, within the meaning of a certain act of parliament passed in 35 *Geo.* 3. c. 3. entitled, &c. duly exhibited, dealt with, examined, confirmed, deposited and filed of record; that one *James Margetts*, before the making of the said order, had been duly incorporated and admitted a free member of the said society; and that although the said *J. M.* had not infringed or broken any of the said rules, &c. *yet he had been wrongfully and contrary to the rules, &c. of the said society, expelled the said society*, and deprived of certain relief and maintenance, which he was entitled to from the stewards of the said society for the time being and other officers and members thereof; and that the said *J. M.* thinking himself and being aggrieved thereby, did, on 2d *March*, 1822, at &c. make complaint thereof to *John Mason*, Esq. and *Robert Edmonds*, Esq. two of the justices, &c. in and for the county aforesaid, and residing near to the place where the said society was established, against one *John Soper* and one *James Camfield*, and then and there took his corporal oath, &c. and then and there deposed to the truth of his complaint, they the said *J. S.* and *J. C.* then being stewards of the said society; that the said *J. S.* and *J. C.* were thereupon duly summoned to appear before the said justices, and being so summoned did, on the 9th *March*, 1822, personally appear and answer to and shew

1825. The King v. Soper.

cause against *the complaint and matters required of them in the said summons,* and the said justices did thereupon make their certain order in writing, signed &c. and sealed &c. whereby they did order *that the said J. M. should be continued a member of the said society,* of which order the said *J. S.* and *J. C.* had notice, and were thereupon, as such stewards, requested and demanded by the said *J. M.* to obey the same, *and to continue the said J. M. a member of the said society;* and that the said *J. S.* and *J. C.* unlawfully and knowingly refused to continue the said *J. M.* a member of the said society and disobeyed the said order, and the said *J. M.* hath ever since remained excluded a member of the said society, in contempt of the laws &c. and against the peace &c. Second count, the same, only stating that the six other defendants were stewards of the society at the time of the disobedience of the order, and had notice of the making of the order, and were requested to continue the prosecutor a member of the society, but that they refused. At the trial before *Alexander,* C. B. at the *Kent Summer* Assizes, 1824, the order of the justices being produced, was as follows:

"To *John Soper* and *James Camfield,* stewards of the friendly society called the society of *Brotherly Philanthropists,* established at *Greenwich,* in the county of *Kent,* under and by virtue of the statutes in such case made and provided, *and to whom else it may concern:*

"Whereas on the 2d day of *March* now instant, *James Margetts,* of &c. carpenter, a free member of the said friendly society, personally complaineth upon his oath to and before us &c. two &c. that he had, for the space of sixteen days now last past, been sick and unable to follow and hath not followed his said trade; *and that you the said stewards did refuse to pay him the sum of* 1*l.* 0*s.* 6*d.* being the arrears of the allowance to which he was entitled as a sick member of the said society during the last nine days of the said period, at the rate of 16*s.* per week, contrary to the form of the statutes in that case made and provided; and whereas

1825.

The King v. Soper.

we the said justices did thereupon issue our summons, requiring you the said stewards to appear before us on this day to answer *the said complaint*, and upon the appearance of you the said stewards before us in pursuance of the said summons, we the said justices have this day proceeded peremptorily to hear and determine in a summary way *the matter of the said complaint*, according to the true purport and meaning of the rules, &c. of the said society, confirmed &c. and according to the authority given to us, &c.; and upon such hearing it hath duly appeared to us, and we are satisfied that the said *J. M.* hath not infringed or broken any of the said rules, &c. and that the sum of 16*s.* is now due to him from the said society for the arrears of his allowance as a sick member thereof;—We do, therefore, hereby order you forthwith to pay to the said *J. M.* the said sum of 16*s.*, and also the further sum of 11*s.* for the costs which the said *J. M.* hath been put unto by reason of you the said stewards refusing to pay him the said allowance; *and we do further order that the said J. M. be continued a member of the said society.* Given" &c.

This order, which bore date 9th *March*, 1822, was served upon the defendants *Soper* and *Camfield* on the 6th *May*, 1822; but it was never served upon any of the other defendants. The stewards for the time being obeyed that part of the order which related to the payment of the money to the prosecutor, but they did not obey that part which ordered that he should be continued a member, on the ground that they had no power so to do. The defendants *Soper* and *Camfield* had been previously indicted at the quarter sessions for disobeying the same order, when they, upon advice, pleaded guilty, and were fined 5*l.* The prosecutor was a sick member, receiving relief during the time in question, and while so receiving relief, was, on one occasion, seen at work, which by the 13th article of the rules of the society, duly allowed by the sessions, rendered him liable to expulsion. The jury found the defendants *Soper* and *Camfield* guilty, and the other defendants not guilty. In *Michaelmas*

1825.

The King v. Soper.

Term last, a rule nisi having been obtained for a new trial on two grounds; first, that the magistrates had exceeded the jurisdiction given them by the statute, in making the order in question; and second, that the allegations in the indictment were not supported by the evidence,

Campbell now shewed cause. When the language of the 15th section of the statute 33 *Geo.* 3. c. 54. comes to be examined, it will be found fully to warrant the magistrates in framing their order in the terms they did. It enacts, that if any member of any society established by virtue of that act shall think himself aggrieved by any thing done or omitted by the society, or person acting under them, two neighbouring justices, on complaint upon oath by such person, may summon the presidents or other principal officers before them, and shall proceed peremptorily to hear and determine in a summary way the matter of such complaint, and shall make such order therein as to them shall seem just. The order states that *Margetts*, being a sick member of a certain society, had complained on oath that the stewards had refused to pay him his arrears of allowance; that the magistrates had summoned the stewards to answer the complaint, and had proceeded to hear and determine the nature of it; and then orders, that the arrears and costs shall be paid to the complainant, and that he shall be continued a member of the society. Now the justices clearly had jurisdiction to make such an order, under the terms of the statute; indeed, it is difficult to imagine powers more ample than are there given. Second, the evidence at the trial fully supports all the material allegations in the indictment. The complaint made in the indictment is, that the prosecutor was expelled from the society for working while he was receiving an allowance as a sick member. [*Bayley*, J. The indictment charges that he was wrongfully expelled, but the order recites no such complaint.] The indictment alleges "that he had been wrongfully and contrary to the rules, &c. of the said society, expelled the said society, and

1825.

The King v. Soper.

deprived of certain relief and maintenance which he was entitled to from the stewards of the said society for the time being." Now that was substantially proved at the trial, and proof of that is sufficient to support this prosecution. It is admitted that the justices made an order for the restitution of the prosecutor to the society, and that the defendants disobeyed that order; but it is said that they were not the stewards of the society at the time when the second prosecution was commenced, and therefore they are not liable. To that, however, there are two answers; first, that they have not put a plea of auterfois convict upon the record, which they ought to have done if they meant to rely upon this point; and second, that they were in office as the stewards on the 6th *May*, 1822, when they were served with the order, and consequently it was their duty to see that it was obeyed. At all events a new trial can only be granted on the condition of the defendants paying the costs of the former trial.

Law, contrà. This indictment cannot be supported. The allegations contained in the indictment were not only not proved, but completely disproved at the trial. No evidence was given of any complaint made by the prosecutor, except the complaint recited in the justices' order, and that contains no mention of any complaint of having been wrongfully expelled. Now, until complaint has been made, the justices have no jurisdiction; and when it has been made, they are to hear and determine the matter of such complaint; that is, of *the* complaint originally made, and which gave them jurisdiction, and no other. Then, as there was no proof of any complaint that the prosecutor had been wrongfully expelled, the magistrates had no jurisdiction to hear and determine any *such* complaint; consequently their order recites no such complaint, but it orders the prosecutor to be continued a member of the society, which order they had no authority to make, because until a complaint had been made of the suspension of a member, they had neither occa-

1825.
The King v. Soper.

sion nor jurisdiction to interfere and order him to be continued a member. This objection, therefore, goes to both points; first, that the evidence does not support the indictment; and second, that the justices having exceeded their authority, their order was void and illegal, and the defendants were not bound to obey it. They are therefore clearly entitled to a new trial, and there seems no reason why that benefit should be clogged with the burden of paying the costs.

BAYLEY, J.—It may be that the prosecutor in this case has been harshly and improperly treated; but looking at the language of the indictment, and comparing it with the evidence on the one side and the act of parliament on the other, it certainly appears to me to be at variance with both. The indictment states that the prosecutor was wrongfully expelled from the society, and that he made complaint *thereof;* whereas the evidence shews clearly that there never was any complaint made of expulsion, and the magistrates' order recites no such complaint. Now the act of parliament provides that complaint shall be made, and that the justices shall hear and determine the matter of *such* complaint; their jurisdiction, therefore, is confined to *the* particular complaint made, and they have no authority to inquire into matters foreign to it. Here they certainly went beyond the matter of complaint, and thereby exceeded their jurisdiction; the defendants, therefore, were not bound to obey their order, at least that part of it which referred to the continuance of the prosecutor as a member, and have consequently been illegally convicted. We are bound, therefore, in my opinion, to make the rule for a new trial absolute; and as the verdict is set aside upon a defect of evidence on the part of the prosecution, I think we ought not to impose upon the defendants the condition of paying the costs.

HOLROYD, J.—I am of the same opinion. I think that, according to the evidence in the case, the verdict of guilty

1825.

The KING v. SOPER.

was clearly wrong, and that consequently, as the defendants have been illegally convicted, they are entitled to a new trial without payment of costs. The allegation in the indictment respecting the prosecutor's expulsion was certainly not made out, and without that allegation this prosecution could not succeed. The magistrates' order recites no complaint of expulsion, therefore they had no power to make any order for restitution or continuance, and in so doing they have clearly exceeded their jurisdiction. If there had been a complaint of expulsion, this would have been a good order, but as there was none, it was manifestly bad, and the defendants were not bound to obey it.

LITTLEDALE, J. concurred.

Rule absolute.

CHATFIELD, Clerk, v. RUSTON.

By a private inclosure act, the tithes of a parish were abolished, and in lieu thereof, a yearly money payment by way of compensation, (to be calculated with reference to the annual value of the tithes and the price of corn for a certain number of bye-gone years,) directed to be made to the vicar quarterly, "free and clear of all rates, taxes and deductions whatsoever:"—Held, that these latter words exempted the vicar from poor's rates in respect of the money so directed be paid to him.

DECLARATION in replevin. Avowry that defendant, being overseer of the poor of the parish of *Chatteris* in the county of *Cambridge*, seized and took plaintiff's goods in satisfaction of rates in arrear, under the authority of the statute 43 *Eliz.* c. 2. Plea in bar, setting out a private act of 49 *Geo.* 3., entitled, "An act for inclosing lands in the parish of *Chatteris*, in the Isle of *Ely*, in the county of *Cambridge*;" which recited, that it was convenient that all the tithes, both great and small, arising and renewing as well out of, in, or upon the said open fields, commonable lands, commons and low grounds, by the said act intended to be divided and allotted, as also out of, in, or upon such of the homesteads, gardens, orchards and inclosures, within the said parish, as were liable to the payment of tithes in kind, should be abolished and extinguished, and that in lieu

1825.

CHATFIELD v. RUSTON.

thereof *an adequate compensation* should be made to the impropriator of the impropriate rectory of *Chatteris* for the time being, and to the vicar of the vicarage of *Chatteris* for the time being, by an allotment in manner thereinafter mentioned, so far as respected the said open fields, lands, commons and low grounds, and by an annual corn rent as thereinafter mentioned, so far as respected the said homesteads, gardens, orchards and inclosures; and enacted, that the said commissioners should make a valuation of all the tithes, both great and small, arising or renewing out of, in, or upon the said homesteads, gardens, orchards and inclosures, and should inquire of the clerks of the market, or of the inspectors of corn returns at *Wisbeach* in the Isle of *Ely*, what had been the average price of good marketable wheat in the said market during the term of fourteen years next preceding the 1st *January*, 1809, and should in and by their award ascertain and set forth what quantity of such wheat, according to the average price aforesaid, would be equal in value to all the tithes arising, renewing, and due and payable out of or for the said homesteads, gardens, orchards and inclosures, according to the valuation to be made as aforesaid; and that there should be issuing and payable to the said impropriator and vicar respectively, such several yearly rents or sums of money, *free and clear from all rates, taxes, and deductions whatsoever*, out of the said homesteads, gardens, orchards and inclosures respectively, as should be equal in value to the quantity of wheat so to be ascertained as aforesaid; which said rents or sums of money should for ever afterwards be payable to the said impropriator and vicar respectively, in such proportions and manner as should be set forth in the said award of the said commissioners, by equal quarterly payments in every year. Averment, that the commissioners had made a valuation of the tithes, and had ascertained the quantity of wheat equal to them in value, and had made their award pursuant to the directions of the act. "And plaintiff further saith that after the passing of the act and the making of the award, and before and at the time

when &c., he was, and from thence hitherto hath been, and still is, vicar of the vicarage of the parish of *Chatteris*, and so being such vicar, at the time when &c. was, and from thence hitherto hath been, and still is, by virtue of the said award, entitled to the said yearly corn rent, so in and by the said award set forth, ascertained and directed to be paid to the said vicar for the time being, free and clear from all rates, taxes and deductions whatsoever. And plaintiff further saith, that the said goods in the declaration mentioned were seized, taken and detained by defendant as overseer of the poor of the parish of *Chatteris*, and as a distress for a certain sum of money, to wit, the sum of £76: 3*s.* 9*d.*, rated and assessed on the 25th *November*, 1823, upon plaintiff, for and in respect of the said corn rents so ascertained and directed to be paid to plaintiff as aforesaid, in and by a certain rate and assessment made and assessed according to the statutes in that case made and provided, for and towards the relief of the poor of the said parish of *Chatteris*, and which said sum plaintiff had, before the taking and detaining the said goods, on demand refused to pay, to wit, at" &c. Demurrer to the plea, and joinder in demurrer.

Tindal, in support of the demurrer. The question intended to be raised on these pleadings is, whether under the inclosure act set out in the plea, by which a corn rent is substituted in lieu of the tithes to the vicar for the old inclosures, such corn rent when paid into the hands of the vicar is rateable to the relief of the poor. On the part of the defendant it is contended, that it is still rateable as the tithes were, before the passing of the act. It is impossible to doubt, that the object of the legislature was to give to the vicar a compensation for the tithes, and nothing more. The statute begins by reciting, that it was convenient that all the tithes, both great and small, arising and renewing, as well out of the open fields intended to be divided and allotted as out of the old inclosures, should be abolished and extinguished, and, in lieu thereof, an adequate compensation should be

1825.
CHATFIELD v. RUSTON.

made to the impropriator of the rectory and to the vicar, respectively. As far, therefore, as this recital goes, the object of the legislature was, to give an adequate compensation in lieu of the old tithes; and when regard is had to the mode in which it is to be calculated, it is manifest, that such only was the intention. It goes on to enact, that the commissioners shall first make a valuation of the tithes, both great and small, and second, ascertain what quantity of wheat is equal in value to all the tithes; and then it enacts, that there shall be issuing and payable to the impropriator and vicar respectively, such several yearly rents or sums of money, *free and clear from all rates, taxes, and deductions whatsoever*, out of the old inclosures, as should be equal in value to the quantity of wheat so to be ascertained. If the argument on the other side is well founded, that the corn rent when raised, is not rateable to the poor in the hands of the vicar, that will be placing the vicar in a better situation than he was before the passing of the act, for at that time his tithes were rateable. Had the intention of parliament been, to put the vicar in a better situation than he was in before, by repealing the 43 *Eliz.* c. 2. with respect to him, they would have said so; but the act is totally silent upon the subject. Certainly no such conclusion can be drawn from the enactment, that this is to be a corn rent "free and clear of all rates, taxes, and deductions." A very sensible construction can be put upon these words without coming to the conclusion, that the vicar is to be in a better situation than he was in before. The rate which is imposed on the parson in respect of the tithe, is not put upon the tithe itself, but what is substituted in lieu of the tithe. If, therefore, there may be by law a rate imposed on the parson whilst he is receiving the tithes in kind, there is no reason why, upon being put in the same situation by the receipt of a corn rent in lieu thereof, he should not be subject to the same liability to be rated as he was before. The mode of paying him the tithes does not alter the principle of his legal liabilities. This mode of putting the case will relieve the Court from

1825.

CHATFIELD v. RUSTON.

the difficulty which the words "free and clear of all rates, taxes, and deductions," are calculated to throw in the way of such a construction. All that is said by the act is, "that there shall be issuing and payable to the vicar, a certain sum of money, free and clear of all rates, taxes and deductions, such as shall be equal to the value of the tithes." The only object of the words "free and clear of all rates, &c." was to declare that, as between the vicar and the occupier of the land, there shall be no claim by way of set off or deduction on the part of the latter, in respect of any taxes or assessments which might theretofore have been claimed; but it does not follow, that because the tithe is paid by a corn rent or in the shape of money into the hands of the vicar, it should not be liable to the same burdens as the tithes were before. These words may have been introduced out of abundant caution, to avoid the operation of those acts of parliament which impose taxes either upon the landlord or tenant, and to prevent any question arising as to the clear sum to be paid into the hands of the vicar, but still leaving the vicar's own liability to pay rates in respect of tithes, or the tithes worth, without reference to the inclosure act. That is the principle on which this case is to be governed, and there are one or two cases to shew, that that is the legitimate and proper construction. In *Rex* v. *Lambeth* (a) it was held, that where a parson allows the occupier of the land to retain his tithes, still he is liable to the poor's rate. So if there be a modus or composition real, the parson is rateable just as much as if he receives the tithe in kind. If this be so, what difference is there in the principle of the parson's liability in this case, arising from the circumstance of his receiving the payment secured by the inclosure act instead of his tithes in kind as heretofore? It cannot be said, that because this payment is called *rent*, any difference arises. There is no magic in the word *rent*. The Court must look to the *nature* of the payment. Rents in one sense are not rateable to the poor; but if the sub-

(a) Stra. 524. See *Reg.* v. *Bartlett*, 16 Vin. Abr. tit. Poor. 427.

1825.

CHATFIELD v. RUSTON.

stance of the thing be a money payment in lieu of tithe, the same liability still continues. The substitution of a corn rent instead of the tithe does not vary the principle on which the payment is made. By the statute 43 *Eliz.* c. 2. the rate is imposed not upon the tithe itself but on the parson in respect of the tithe. Here therefore the rate will attach upon that which is substituted in lieu of the tithe. For this *Lowndes* v. *Horne*(a) is an express authority. A corn rent, when it is paid into the hands of the parson in lieu of tithes and as an equivalent, is still rateable under the words of the statute of *Elizabeth*. There are one or two cases which establish this point. [Here the Court stopped him.]

Marryat, contrà. The effect of the statute set out in the plea is to exempt the vicar from the liability to pay poor's rates, and no other construction can be put upon the words "free and clear from all rates, taxes, and deductions whatsoever." This principle is established by the cases; if a parson lets his tithes by parol for a year, then he is considered only as the seller of the tithes, and he is still rateable; but if he makes a permanent bargain by lease, binding himself during the whole term at a fixed unvarying rent, then he ceases to be rateable, and the liability attaches upon the lessee. So if an act of parliament gives the parson a compensation in lieu of tithes, free from all rates, taxes, and deductions whatever, he is also exempt. In this case the act of parliament gives the clergyman a certain corn rent in lieu of his tithes, which is to be paid during a certain number of years, without any variation as to the amount, and therefore it is to be construed as a lease of the tithes, and subject to the same rule of law. The case of *Rex* v. *Lambeth*, as reported in 8 *Mod.* 61. is an authority against, instead of being in favour of the argument on the other side. It appears from that report of the case, that the parson had let the tithes on lease, and that the lessee had allowed the occupiers of the land to retain, and it was held, that the

(a) 2 Sir W. Bl. 1252.

farmers of the tithe were to be rated; but it was added by the Court, "it is true it might be otherwise if an under-lease had been made thereof." The case of *Lowndes* v. *Horne* is mainly distinguishable from this. In that case there was no provision that the money should be paid as *rent*. Here the language of the act is, that there should be issuing and payable to the vicar a yearly "*rent*" out of the old inclosures, which makes a material distinction between the two cases. But it is said, on the other side, that the words "free and clear from all rates, taxes, and deductions whatsoever," may mean, as between the vicar and the occupier of the land, such deductions as the latter might theretofore have been allowed to make, leaving the vicar's liability to pay poor rates still untouched. The act of parliament, however, contains the words "rates and taxes." It cannot be doubted that these words were meant to include "all parish rates" on the one hand, and "all parliamentary taxes" on the other. No other sense can be given to the words. The next case applicable to this subject is *Rex* v. *Toms* (*a*). In that a private act of parliament had passed for settling the rights of the vicar of *St. Michael's, Coventry*, and by one section it authorized the making an assessment in a certain mode. By a subsequent section an option was given to the parish officers to raise for the vicar yearly, in lieu of the assessment before provided for, a sum not exceeding 300*l.* and not less than 280*l.* which was to be paid to him "clear of all taxes, deductions, charges, and expenses, parochial, parliamentary, or otherwise whatsoever;" and Lord *Mansfield* held, that although the claims of the vicar were satisfied by the former mode, and the clause appointing that mode did not contain any express exemption, yet the vicar was not liable to be rated in respect of the money so raised. Wherever an act of parliament contains an exemption in terms similar to the present case, either with respect to tithes or tolls, it has always been construed sufficient to exempt property from poor rates. This principle was re-

(*a*) 1 Doug. 401.

1825.

Chatfield v. Ruston.

cognized with respect to tithes in *Rex* v. *Topham* (a). So also it was recognized and adopted with respect to tolls in *Rex* v. *The Hull Dock Company* (b), *Rex* v. *The Calder and Hebble Navigation* (c), and *Rex* v. *The Grand Junction Canal* (d). In a more recent case, *Rex* v. *The Justices of Buckinghamshire* (e), where the question was whether a rector who lets his tithes by parol to the occupiers of lands, in respect of which the tithes arise, and receives a half-yearly composition in the nature of *rent*, can be treated as an *occupier* of tithes within the meaning of the general highway act, 13 *Geo.* 3. c. 78. s. 34. and rateable to the highways in the parish, the Court entertained considerable doubt upon the point, and therefore refused a mandamus to justices to issue a warrant of distress to levy the rate on the rector. But none of these cases are so strong as the present; for here there is a specific parliamentary contract, expressly exempting the vicar from all rates and taxes. The commissioners in making their computation of the value of the tithes must be supposed to have calculated what would have been their equivalent, free from the payment of taxes and assessments, and therefore there is no reason whatever for restraining the natural import of the words of exemption now relied upon. On these grounds the avowry is answered by the plea.

Tindal, in reply. It is assumed on the other side, that the commissioners must be supposed to have taken into their calculation the value of the tithes, exempt from the payment of taxes and assessments. That fact does not appear one way or the other, and therefore cannot be assumed. The question is, what is the legal interpretation to be put upon the statute set out in the plea? If it be clear that the object of the statute was merely to give to the vicar a compensation in lieu of the tithes, which would

(a) 12 East, 540. (b) 1 T. R. 219.
(c) 1 B. & A. 263. (d) Id. 289.
(e) Ante, vol. ii. 680.

otherwise have been payable, then it follows, as a legal conclusion, that the words "free and clear from all rates, taxes, and deductions whatsoever," mean nothing more than free and clear from all rates and taxes *as between the occupier of the land and the vicar.* The words of exemption relied upon cannot receive the unlimited construction contended for. Suppose the property tax act were now in operation, could it be contended, for a moment, that the vicar would be exempt from the payment of that impost under the operation of the words "all rates, *taxes,* and deductions whatsoever?" Clearly not; and therefore the argument on the other side shews, that the obvious intention of the legislature was to prevent disputes between the vicar and his parishioners, by providing that the parson shall have a net sum without regard to such taxes and rates as are usually paid by the occupier in the first instance; but still leaving the parson's own personal liability to poor's rates under the statute of *Elizabeth,* in respect of the beneficial enjoyment of the tithes in another mode, as it stood before. If the legislature had intended to exempt the parson from the poor's rate in respect of this money payment, it would have said so in terms; and the silence of the act of parliament upon this point shews that it was not intended to relieve the parson from his own personal liability quà parson. The case of *Rex* v. *Toms* was well decided, but it does not apply to the present case, except in so far as it strengthens the argument in favour of the rateability of the parson in this instance. There the difficulty arising here was provided for. The overseers having first to make an assessment upon the parish to pay the parson's stipend, it would have been somewhat singular, if, after a limited sum was raised for that purpose, the parson's income was to be subjected to a deduction at the instance of the same persons in the shape of a poor's rate. The cases with respect to tolls are wholly inapplicable, because tolls not being rateable, per se, it was necessary to introduce into canal acts such special provisions as would either exempt them from,

1825.

CHATFIELD v. RUSTON.

or subject them to rates, as matter of convention. The short answer to the case on the other side is, that if the legislature had meant to exempt the vicar from poor's rates, they would have done so in terms, but not having done so, the vicar is liable, under the statute of *Elizabeth*, to be rated as other parsons and vicars, notwithstanding the words of exemption contained in this inclosure act.

Bayley, J.—Under the statute 43 *Eliz.* c. 2. there is no doubt that a parson or vicar, eo nomine, is liable to be rated, and it is not at all necessary, in order to bring him within the operation of that act, to shew that he is an occupier of lands in the parish. But the question here is, whether there is or is not an exemption in this private act of parliament in favour of the present plaintiff. This act was a matter of bargain between the proprietors of lands on the one hand, and the vicar on the other. They were to make their own terms, and specify what those terms should be, and then from seeing the language they have used, we are to determine what they meant, and what it is the legislature has sanctioned. The act begins by declaring that the commissioners shall make a valuation of the tithes arising or renewing out of, in, or upon the homesteads, gardens, orchards, and inclosures, &c.; that provision will operate upon every homestead, garden, orchard, and inclosure in the parish, and therefore will be a benefit connecting itself with every proprietor in the parish, because from and after the passing of the act, he will hold his property free from the payment of tithes, which must have a natural tendency to increase the value of his land, by enabling him to obtain a higher rent. When the commissioners have ascertained the value of the tithes, they are to inquire what has been the average price of good marketable wheat during fourteen years prior to 1819, and then set forth in their award what quantity of such wheat would be equal to the value of the tithes. I am very much disposed to think that upon this part of the act, the commissioners could not, as has been

suggested, make up the value of the tithes upon the principle that the clergyman would afterwards be liable to pay rates and taxes out of the money which he received; and therefore up to that extent I go along with Mr. *Tindal*, in thinking that the bargain on the part of the vicar would be for the full money value of the tithes if sold by an indifferent person. Then comes the provision that "there should be issuing and payable to the impropriator and vicar, respectively, such several yearly rents or sums of money, as should be equal in value to the quantity of wheat so to be ascertained;" but these payments are to be "*free and clear from all rates, taxes, and deductions whatsoever.*" Now do these words mean any thing? If they do, we are to say what their meaning is. To my mind the sense endeavoured to be put upon them, in the argument for the defendant, is by no means satisfactory. It is suggested, that they mean free and clear from all rates, taxes, and deductions whatsoever, as between the vicar and the occupier, which the latter would be entitled to set off prior to that period, when paying his tithes. But what those deductions are to be is not pointed out, and therefore there is no satisfactory solution of their meaning. The words are either useless, or they must have some meaning. It cannot be said that they are useless, for we must not assume that in making a bargain of this kind, which was to be sanctioned by act of parliament, the parties would allow the introduction of words of such import, without duly considering what they meant to express. We must suppose that the parties to be affected by them were fully aware of their import. I can conceive that the vicar would say to the parishioners, "I am now acceding to that which I cannot be compelled to accede to. You cannot get this inclosure act passed unless you do something for me. You have not been in the habit of assessing me to the poor rate, because I have been easy with you as to the tithes, and therefore I wish to continue upon the footing that I have hitherto been."—Or he might say, "I have been in the habit of being rated; I think that is a

1825.

CHATFIELD v. AHUSTON.

hardship upon me, it not being the practice in any other part of the kingdom to rate the vicar; I will have a money-payment for my tithe, free and clear from any burthen that the poor may bring upon the parish: that shall be a sum, with reference to any deductions for which I might be liable, if the tithes were taken in kind, and I agree to take that sum for a given number of years, on condition of introducing these words, 'free and clear from all rates, taxes, and deductions whatsoever.'" Now the only tax which the parishioners would have been previously entitled to deduct would have been the land-tax. The vicar would clearly be exonerated from that. If so, why is he not to be exonerated from all other rates and taxes, when the words are large enough to effect that object; and when it is reasonable to suppose that such was the stipulation on the one hand, and assented to on the other? The difficulty I have is in saying, how any meaning can be put upon the words, unless we hold that the money is to be paid free from every rate, every tax, and every deduction whatsoever. It appears to me that the intention of the act was, to pay into the vicar's hands a neat sum of money applicable wholly and solely to his own purposes, and not liable to any diminution by poor rate, land-tax, or any other deduction whatsoever. On these grounds I am of opinion, that the plaintiff is entitled to judgment.

HOLROYD, J.—I am also of opinion, that the vicar is entitled to a complete exemption from all rates, taxes, and deductions whatsoever. There is no rule of construction applicable to acts of parliament, which is to restrain the operation of the words in question to a more narrow extent, if any meaning is to be given to the language of the legislature. It is true that the tithes of the parish are to be abolished, and that an adequate compensation is to be given to the vicar in lieu of them; but I think it must be taken, from the language of the act of parliament, that the intention was, that an adequate compensation should be given, free

from all rates, taxes, and deductions whatsoever. It appears to me that that part of the act which declares that there should be "issuing and payable to the vicar a yearly rent or sum of money," means, that he shall "have and keep" the *whole* of such yearly rent or sum of money, free and clear from all rates, taxes and deductions whatsoever. If this exemption was meant to be beneficial to the vicar, which no doubt it was intended, I can see no benefit he derives, if he is first to have his right to tithes reduced to a money-payment for a given number of years, and then to be liable to a separate rate upon himself. If the words are to have any operation, we must put upon them their natural and obvious sense; and, in my opinion, that is, to exempt the vicar from poor's rate as well as all other taxes and deductions whatsoever.

LITTLEDALE, J., who had advised upon the case when at the bar, declined giving any opinion.

Judgment for the plaintiff.

IRESON v. PEARMAN, Gent. one, &c.

By indentures of lease and release, dated in 1796, an estate was conveyed to *A.* and *B.* to the use of *A.* his heirs and assigns for ever. *A.* devised the estate to his daughter and to the heirs of her body, but in case she died without issue of her body at her decease, then to his nephew and his heirs for ever. In *February*, 1814, the daughter suffered a recovery of the estate, and upon her marriage, in *March* in the same year, executed deeds of lease and release, reciting that she was seised in fee simple of the estate, and conveyed the same to trustees in trust for her and her husband and their issue, and in default of issue to such person as she should appoint. The marriage took place, and the daughter died without issue, having devised the estate in fee to her husband, who survived her.—Held, that the recovery suffered by the daughter was inoperative, because at that time the *legal* estate for life was in *B.* and she was only *equitable* tenant for life with a legal remainder in tail, and, consequently, that her husband had no title.

Where the attorney of the vendee of an estate was employed to investigate the title thereto, and in taking the opinion of counsel thereon, omitted to state in the case, certain deeds materially affecting the title, and upon the faith of the opinion given (which would have been different had all the deeds been stated) the vendee concluded the purchase, but was afterwards damnified by finding that the title was imperfect:—Held, that the attorney was liable to him in an action for negligence.

ASSUMPSIT against an attorney, for negligence. Plea, non assumpsit, and issue thereon. At the trial before *Hul-*

1825. IRESON v. DEARMAN.

lock, B. at the last *Lent* assizes for the county of *Warwick*, the plaintiff obtained a verdict, damages 600*l.*; but the defendant having moved for a new trial, the Court directed the facts to be stated in a special case.

The plaintiff had contracted for the purchase of an estate, consisting of freehold lands and premises, at the sum of 3,400*l.* from one *Joseph Burbidge*, who had contracted to sell the same to the plaintiff in fee. In 1818 the plaintiff employed the defendant as his attorney to inquire into and inspect the title of *Burbidge* to this estate. By indentures of lease and release of the 9th and 10th of *October*, 1796, respectively, the estate in question was conveyed to *Thomas Malin*, the father of *Elizabeth*, late wife of *Burbidge* the vendor, and to one *John Caldecott*, to hold unto the said *T. Malin* and *J. Caldecott*, and their heirs and assigns, to the only proper use and behoof of the said *T. Malin* and *J. Caldecott*, and the heirs and assigns of the said *T. Malin* for ever, (the estate of the said *J. Caldecott* being used only in trust for the said *T. Malin*, his heirs and assigns.) *Malin*, by his will of the 11th of *April*, 1807, gave and devised the said estate to his daughter *E. Malin*, and to the heirs of her body; but in case she died without leaving any issue of her body, lawfully begotten, and living at her decease, then he gave and devised the estate to his nephew *Thomas Malin*, and to his heirs for ever. *E. Malin*, the daughter, afterwards married one *Wagstaff*, and after his death, on the 11th of *February*, 1814, by indenture of bargain and sale of that date duly enrolled, the said *E. Wagstaff*, therein described as only child and devisee in tail general under the last will and testament of *T. Malin* deceased, granted, bargained, sold, and confirmed the said estate to one *J. T. Wratislaw*, to hold to the said *Wratislaw*, his heirs and assigns, to the intent that he might become tenant of the freehold, against whom a good and perfect recovery might be suffered, wherein one *J. Dawson* was to be demandant, *Wratislaw* tenant, and *E. Wagstaff* vouchee, to the use of *E. Wagstaff*, her heirs and assigns for ever. In pursuance of this deed, a

1825.
IRESON v. PEARMAN.

recovery was suffered in *Hilary* term, 54 *Geo.* 3., wherein the said *Dawson* was demandant, *Wratislaw* tenant, *E. Wagstaff* vouchee, and one *T. F. Martin* common vouchee of the said estate. *E. Wagstaff*, by indentures of lease and release and settlement, of the 4th and 5th of *March*, 1814, of four parts, made between the said *E. Wagstaff* of the first part, *J. Burbidge* of the second part, *J. Drayson* and *W. Dester* of the third part, and *J. Dawson* and *J. T. Wratislaw* of the fourth part; after reciting that the said *E. Wagstaff was seised in fee simple of the said estate*, and that a marriage was intended to be had between the said *E. Wagstaff* and *J. Burbidge*, the same was limited and assured to the said *J. Drayson* and *W. Dester*, in trust for the said *E. Wagstaff* and *J. Burbidge*, and the issue of the said marriage; and, in default of issue, to such person as she should appoint by deed, or by her last will and testament in writing, direct, limit, or appoint. The marriage between *J. Burbidge* and *E. Wagstaff* was afterwards duly solemnized, and she died without issue, leaving the said *J. Burbidge* her surviving, having by her will of the 28th of *August*, 1815, made under the said power, given, devised and bequeathed the said estate, to the use of her husband *J. Burbidge*, his heirs, executors, administrators, and assigns, for ever. *J. Burbidge*, after the death of his wife, having contracted to sell the estate to the plaintiff in fee, in pursuance of such contract an abstract of his title, as vendor, containing sixty-five brief sheets, was sent by the vendor's attorney to the defendant as attorney for the vendee, containing among other things the deeds of the 9th and 10th of *October*, 1796, and the defendant received the same in that character; but in that abstract the vendor's attorney wholly omitted to state certain indentures of lease and release, dated the 25th and 26th of *February*, 1814, made between *J. Caldecott* of the one part and *E. Wagstaff* of the other part, whereby *J. Caldecott* conveyed the said estate vested in him, unto the said *E. Wagstaff*, her heirs and assigns; but an abstract of those deeds was delivered by the vendor's solicitor to the defendant

1825. IRESON v. PEARMAN.

on the 27th of *March*, 1818. The conveyance and assignment of the estate to the plaintiff were executed on the 24th of *July*, 1818. *J. Caldecott* is still living. The defendant, in the course of the said employment, after such receipt, instead of sending the original abstract, or a complete copy thereof, for the consideration and advice of counsel, prepared and sent to *R. Preston*, Esq. the counsel whom he consulted, a case, as and for an abstract, containing only eight brief sheets, being part of the abstract of sixty-five sheets, commencing the account of title with the will of *T. Malin*. The abstract of sixty-five sheets included sixty years' title. The abstract of eight sheets contained an abstract of the will of the said *T. Malin*, of the deed of the 11th of *February*, 1814, of the recovery of *Hilary* term, 54 *Geo.* 3., of the deeds of the 4th and 5th of *March*, 1814, and of the will of *E. Burbidge*, of the 28th of *August*, 1815; but omitted altogether to mention the deeds of the 9th and 10th of *October*, 1796. Upon occasions of this sort, it is most usual for the vendee's attorney to send to the counsel whose opinion he takes, the original abstract as he receives it from the vendor's attorney, but the practice is not always so. At the end of the said case of eight sheets, the defendant stated the following case, and laid the same before Mr. *Preston*. "Case. *Thomas Malin*, the testator (in p. 1.) *was seised in fee* of the premises described in p. 4. to be situate in *Woolscott*, in the parish of *Grandborough* (he having purchased the same), subject to a mortgage which he made thereon for 2,000 years, for securing 2,400*l.* and interest, 1,000*l.* of which was due at his decease, the residue having been repaid by him. Mr. *T. Ireson* has purchased the premises described in p. 4. of Mr. *Burbidge*, the devisee under his wife's will: you will please to advise whether Mr. *Burbidge* can make a good title to the said premises to Mr. *Ireson*, and by what means." Upon which case Mr. *Preston* gave the following opinion. "A good title may be made by Mr. *Burbidge* and his mortgagee to Mr. *Ireson*. The conveyance should be made by

indentures of lease and release from Mr. *Burbidge*, and by an assignment of the residue of the term of 2000 years, to attend the inheritance. Judgments, if any, of which there is notice, and crown debts against Mr. *Burbidge*, are incumbrances. The widow (if any) of *Thomas Malin* is dowable." In consequence of the omission of the deeds of the 9th and 10th *October*, 1796, Mr. *Preston* gave the opinion above stated, which opinion he would not have given if those deeds had been set out in the case or abstract laid before him; and he stated, that if the deeds of the 25th and 26th *February*, 1814, had been set out in the case, that also would have made a difference in his opinion. Under these circumstances the plaintiff, being advised that his title was incomplete, paid 700*l.* to *T. Malin*, the devisee in remainder under the will of *T. Malin* the testator, for confirmation of his title, who accordingly, in consideration thereof, in *February*, 1822, executed to the plaintiff certain deeds of lease and release for that purpose. The plaintiff also paid, on this occasion, the attorney whom he employed in procuring this confirmation, two several sums of 170*l.* and 74*l.*, for his fees, trouble, and expense relating thereto.

W. E. Taunton for the plaintiff. In order to support this action, two propositions must be made out; first, that the title to the estate was defective; and second, that the defendant has been guilty of a degree of negligence cognizable by the law. First, the title was clearly defective, because the recovery was rendered inoperative by *Caldecott*, who had a prior estate of freehold, not joining in it. By the deeds of 9th and 10th *October*, 1796, the estates were conveyed to *Malin* and *Caldecott*, to hold to them and their heirs and assigns, to the only proper use of them and the heirs and assigns of *Malin* for ever; *Caldecott*, therefore, upon the decease of *Malin*, became seised of a legal estate of freehold for life, and *Malin's* daughter had an equitable estate for life, with the legal remainder in tail under the will of her father. Then, assuming the situations of these par-

1825.
IRESON v. PEARMAN.

ties to be such by operation of law, a recovery suffered by the former, without the co-operation of the latter, must clearly be void; because it is an established and well known rule of law, that in order to suffer a valid recovery, the whole estate must be either legal or equitable. It was indeed held in *Champernowne* v. *North* (*a*) that a recovery suffered by a cestui que trust in tail, who is in possession of the land under the trustee, is valid so far as to bar *such* an estate tail and the equitable reversion depending upon it, though there is no legal tenant to the præcipe; but it was also held in *Robinson* v. *Cuming* (*b*) that such a recovery would not extend to affect a legal remainder, for recoveries suffered by parties having equitable interests can operate only upon equitable trusts. *Salvin* v. *Thornton* (*c*) was the case of a recovery suffered by a party in the situation of equitable tenant for life, and legal tenant in tail in remainder; and the Court there said that the party suffering the recovery had not such an estate as would enable him to suffer either a perfect legal or a perfect equitable recovery; for that in suffering a recovery an equitable estate cannot be blended with a legal estate; and upon that ground they held the recovery altogether void. The same rule was laid down in *Shapland* v. *Smith* (*d*), and the same principle, though under somewhat different circumstances, was acted upon in *Silvester* v. *Wilson* (*e*) and *Doe* v. *Collier* (*f*). This recovery, therefore, is altogether void. Secondly, the defendant has been guilty of such negligence as is cognizable by the law, and for which he is answerable in the present form of action. He receives an abstract, including sixty years' title, and instead of laying the whole of it before counsel, he furnishes him with only a part, and commences his case by stating that *Thomas Malin* died seised in fee of the estate. Now that was not true, for *Thomas Malin* was not absolutely seised in fee; he had only the equitable fee:

(*a*) 2 Ch. C. 63. 78; 1 P. Wms. 91, S. C.
(*b*) 1 Atk. 473; Forester, 167. S. C.
(*c*) 1 Bro. Ch. C. 73.
(*d*) 1 Bro. Ch. C. 75.
(*e*) 2 T. R. 444.
(*f*) 11 East, 377.

1825.
IRESON v. PEARMAN.

the legal freehold was in himself and *Caldecott* for life. That was a gross error. Taking the case as stated by the defendant, no lawyer would doubt that there was a complete title; but taking it as he ought to have stated it, it is admitted that the plaintiff would have been differently advised. This is crassa negligentia, for which the defendant ought in justice to be, and is upon the authority of decided cases, liable in an action. *Russell* v. *Palmer* (*a*) was an action against an attorney, for negligence in not charging a defendant in execution within two terms after judgment obtained against him, pursuant to the rule of Court, 2 *Geo.* 1.; and though it was conceded that the language of the rule was obscure, and its construction doubtful, still the whole Court held that the defendant was guilty of negligence, and that the action was maintainable (*b*). *Reece* v. *Rigby* (*c*) was a similar action; the alleged negligence being that the defendant permitted the plaintiff's cause to be called on without first ascertaining that a material witness, whom the plaintiff had undertaken himself to bring into Court, was in attendance, in consequence of which the plaintiff was nonsuited; and there the Court held, the jury having found as a fact that the defendant had not used proper diligence in conducting the cause, that the action was maintainable in point of law.

Tindal, contrà. The recovery in this case was a good equitable recovery. First, the uses in the deeds of the 9th and 10th of *October*, 1796, were not executed by the statute; therefore, they became a conveyance at common law, and *Caldecott*, by his survivorship, took the legal fee under the habendum, in trust for the devisees under *Malin's* will. Then, Mrs. *Wagstaff*, at her father's death, became equitable tenant in tail in possession, with an equitable remainder in fee to *Thomas Malin;* and so the recovery was a good equitable recovery, and barred that equitable remainder.

(*a*) 2 Wils. 325.
(*b*) Vide *Laidler* v. *Elliott*, ante, 635.
(*c*) 4 B. & A. 202.

1825.

IRESON v. PEARMAN.

Now this case is not within the statute of uses, 27 *H.* 8. c. 10. It is not within the first section, because that applies only to conveyances "where any person shall be seised of lands, &c. to the use, confidence, or trust of any other person;" whereas the conveyance here is to the use of two persons, namely, *Malin* and *Caldecott*. Nor is it within the second section, which applies only to conveyances "where divers and many persons shall be jointly seised of any lands, &c. to the use, &c. of any of them that be so jointly seised;" for that section is clearly copulative, not disjunctive, and the phrase "divers and many" must imply certainly more than two persons; whereas here the conveyance is to the use of two only, with remainder to the heirs of one of them; and the statute consequently can operate at most only with reference to the joint estate declared in use for the lives of the two, and cannot extend to the separate and ulterior estate of the third party. This then is a common law conveyance within the decision of the Court in *Jenkins* v. *Slade*(a). There one gave land to *E. R.* and his wife, habendum to them, to the use of them and the heirs of their two bodies; and for default of such issue, over; and it was held that they took an estate tail; they were in by course of common law, for this operated as a common law conveyance. So in *Gilbert* on Uses, 237.7. it is said, If *A.* and *B.* be enfeoffed to the use of *A.* and his heirs, and *A.* dies, the whole use shall descend to his heirs; but *B.* shall remain the sole tenant of the land, for this seemed the intent of the parties by the limitation of the use. The same principle is laid down in *Bacon* on Uses, s. 63., and in *Bacon's* Works, vol. iv. p. 204. But, supposing the statute does apply to this case, still, during *Caldecott's* life at least, Mrs. *Wagstaff's* estate was equitable and not legal. The conveyance was to *Malin* and *Caldecott* for life; remainder to the heirs of *Malin*: the estate tail to Mrs. *Wagstaff*, therefore, was equitable, and continued so up to the time of suffering the recovery; for

(a) Cro. Car. 230. 244.

1825.

IRESON v. PEARMAN.

until the recovery was suffered, there was an equitable tenant to the præcipe, and an equitable contingent remainder. If indeed Mrs. *Wagstaff* had survived *Caldecott*, and after his death had suffered the recovery, the case would have been different, because then her equitable estate tail would have been destroyed; but, as it was, it never was destroyed: the nature of her estate was indeed changed, because she acquired the fee during the life of *Caldecott;* but that is immaterial, because the nature of an estate may depend upon, and be changed by, the happening of a contingency: *Doe* v. *Selby* (*a*). But, supposing further, not only that the statute applies, but that Mrs. *Wagstaff*'s estate was legal; that is, that the use to *Malin* in fee was executed by the statute; and that Mrs. *Wagstaff*, therefore, necessarily had the legal estate tail; still, the remainder to *Thomas Malin* was a contingent, and not a vested remainder; consequently, if the particular estate upon which it was contingent was destroyed before it vested, it was thereby destroyed also. Now that particular estate, namely, Mrs. *Wagstaff*'s estate for life, has been destroyed by three several means: first, by the operation of the bargain and sale to *Wratislaw;* second, by the operation of the recovery, which operated by way of estoppel; and third, by the merger of the particular estate into the reversion in fee. First, the bargain and sale put the estate tail in abeyance; *Co. Litt.* 331. a. But, not relying upon that, but admitting that the whole estate tail passed to *Wratislaw*, and that he took a base fee, still the estate which he took was not the same estate which was in Mrs. *Wagstaff*. The estate conveyed by Mrs. *Wagstaff* to *Wratislaw* was determinable in two ways; first, by failure of issue of herself, the tenant in tail; and secondly, by the entry of such issue; but the estate in Mrs. *Wagstaff* was determinable in one way only; therefore it was not the same estate. Now, in order to support the contingent remainder, it must be the same estate; *Fearne's Cont. Rem.* 338. Second, the particular estate has been destroyed by

(*a*) Ante, vol. iv. 608.

1825.

IRESON v. PEARMAN.

the recovery operating by way of estoppel, for the recovery passed the interest of the parties by estoppel; *Shepherd's Touchstone*, 48., *Lord Say* & *Seal's* case (*a*), and *Green* & *Harris's* case (*b*); the contingent remainder, therefore, is gone, for the destruction of the particular estate must bring with it the destruction of a remainder contingent upon that estate. A recovery suffered by tenant for life will bar contingent remainders; *Goodright* v. *Dunham* (*c*) and *Goodtitle* v. *Billington* (*d*); but a conveyance by lease and release, executed by a tenant for life, will not. Third, Mrs. *Wagstaff's* estate tail is merged in the reversion in fee, and thus also the contingent remainder is destroyed. She was tenant in tail under the will of her father, with the reversion in fee by descent from her father; then while her tenancy in tail continued unaltered, it did not merge; 2 *Cruise's Dig.* tit. 17, s. 42, p. 429; for it was protected by the statute *De Donis* (*e*): but here the tenancy in tail was altered, for by the operation of the bargain and sale and the recovery, it was converted into a base fee, and then it merged in the reversion in fee; 2 *Prest. Conv.* 240 (*f*). Then, secondly, even if the title was defective, still this action is not maintainable, for an attorney is not liable unless there be in his conduct either crassa negligentia, or lata culpa; *Pitt* v. *Yalden* (*g*), *Baikie* v. *Chandless* (*h*), and *Laidler* v. *Elliott* (*i*); and there was neither the one nor the other in the conduct of the present defendant. He exercised his best discretion in the management of the business. He laid such a case before counsel as he thought best calculated to obtain an opinion whether the vendor could make a good title or not. Having done that, he did all that he was bound to do; for an attorney is not bound in every such case to lay before counsel the abstract which he has received. He may exercise his own

(*a*) 10 Mod. 45.
(*b*) Godbolt, 147.
(*c*) 1 Doug. 264.
(*d*) 2 Doug. 753.
(*e*) 13 Ed. 1. c. 1; vide 2 Rep. 61; 8 Rep. 74; Cro. Eliz. 302.
(*f*) Vide 1 Rep. 49, a.; Hob 223; Dyer, 115, pl. 66; 3 Bac. Abr. 316.
(*g*) 4 Burr. 2060.
(*h*) 3 Camp. 17.
(*i*) Ante, 635.

judgment upon the title, and if he does that fairly and honestly, and acts with reasonable skill and diligence, he is not responsible, even though his judgment ultimately proves erroneous. Here the defendant did all he could; for as the deeds of the 25th and 26th of *February*, 1814, were not included in the abstract furnished to him, he could not lay them before counsel, and as the deeds of the 4th and 5th of *March*, 1814, recited the fact of Mrs. *Wagstaff* being seised in fee, there was nothing that could reasonably excite his suspicion that *Malin* had died before *Caldecott*.

The Court took time to consider of their judgment, which was now delivered by

BAYLEY, J.—This was an action against the defendant, an attorney, employed as such by the plaintiff in the purchase of an estate. In the course of his employment, he received from the vendor an abstract of his title, upon examining which he assumed that *Thomas Malin* was seised in fee of the estate. The title rested upon certain deeds of the date of 1796, which conveyed the estate to *Malin* and *Caldecott*, to hold to them and their heirs and assigns, to the use of them and of the heirs and assigns of *Malin* for ever. The legal consequence of those deeds was that *Caldecott* and *Malin* took an estate for life as joint tenants, with an inheritance in fee vested in *Malin*. *Malin*, by his will, devised the estate to his daughter in tail, and she, in 1814, suffered a recovery. The first question, namely, the validity of the title, depends upon the validity or invalidity of that recovery; and the second question, assuming the title to be defective, is, whether the defendant has been guilty of that species of negligence which renders him liable in this action. *Malin* died, and *Caldecott* survived him; therefore his life estate continued at law, and the devise by *Malin* to his daughter conveyed only an estate tail, expectant upon the determination of that life estate. *Malin's* daughter suffered a common recovery in the lifetime of *Cal-*

1825.

IRESON v. PEARMAN.

decott, and for that purpose conveyed the estate to *Wratislaw*, in order to make a tenant to the præcipe. Her legal estate at that time was no more than an estate tail, expectant upon the determination of *Caldecott's* life estate, and if there was not a good tenant to the præcipe, the recovery was clearly bad. What was the situation of *Malin's* daughter at that time? *Caldecott* was tenant for life, and trustee for her and her heirs in tail; therefore she had an equitable estate pur autre vie while *Caldecott* lived, and a legal remainder in tail. Now, a recovery may be suffered either by a legal or an equitable tenant in tail, but then the person having the legal or equitable estate for life must join in the recovery, except in the cases provided for by the statute of the 14 *Geo.* 2. c. 20, with respect to leases for lives. Here the tenant for life did not join in the recovery, consequently this was a recovery suffered by a person whose only legal estate was a remainder in tail, and for that reason clearly invalid. It is true that she had also, when she made a tenant to the præcipe, a preceding equitable estate for life; but that does not alter her situation, for the cases of *Shapland* v. *Smith* and *Salvin* v. *Thornton* have decidedly established that an equitable estate for life and a legal remainder in tail cannot unite to make a valid recovery; but that in order to make a good tenant to the præcipe, there must be either a legal estate for life and a legal remainder in tail, or an equitable estate for life and an equitable remainder in tail. The estate must be wholly legal or wholly equitable: the two cannot be blended: that was laid down broadly in *Shapland* v. *Smith*. Then it has been said, that admitting the recovery to be void, still the plaintiff has sustained no injury, for that the estate tail, upon which *Malin's* contingent remainder depended, was destroyed by the bargain and sale, and consequently the remainder was destroyed also. The short answer to that argument is, that the daughter's conveyance by bargain and sale of the estate to the tenant to the præcipe, could convey no more than she had, and consequently could not operate to destroy the

remainder. The recent case of *Doe* v. *Jones* (a) is an authority shewing that an estate tail can be discontinued only by the tenant in tail in possession; no act by a remainder-man in tail can destroy the estate tail. It being then made out, that the title in this case was defective, and that the plaintiff has thereby sustained an injury, the remaining question is, whether the defendant has been guilty of negligence. It is not necessary for us to decide whether there has been negligence or not; the jury have found that there has; and the only question for us is, whether there is evidence sufficient to justify them in so finding. We are of opinion that there was such evidence. The defendant laid a case before counsel, but he chose in that case to assume the fact that *Malin* was seised in fee, instead of setting out the deeds themselves, which would at once have shewn that *Caldecott* had an estate for life. Now, without going the length of saying that it is the duty of an attorney to know the legal effect of conveyances, it certainly is his duty either to draw right conclusions from the deeds laid before him, or to lay the deeds themselves before his counsel; and if he withholds the deeds, and draws a wrong conclusion, he does it at his peril. We are therefore of opinion, that in withholding the deeds from Mr. *Preston*, and himself drawing the erroneous conclusion that *Malin* was seised in fee, the defendant was guilty of negligence. There is one other circumstance from which we think negligence may be inferred. The defendant received the abstract of the title in *February*, 1818. That abstract contained no notice of the deeds by which *Caldecott* conveyed the estate to Mrs. *Wagstaff*; but when he received those deeds, which was before any conveyance was made to the plaintiff, he did not lay them before Mr. *Preston*, and inquire whether they made any alteration in his opinion; which they certainly would have done, because if *Malin* had really been seised in fee, *Caldecott* could not have had any thing to convey. For these reasons we are of opinion, first, that the title was defective, and second, that there was

(a) Ante, vol. ii. 373.

1825.

IRESON v. PEARMAN.

sufficient evidence to justify the jury in coming to the conclusion that the defendant was guilty of such negligence as renders him liable to this action. The judgment of the Court, therefore, must be for the plaintiff.

Judgment for the plaintiff.

THOMAS v. THOMAS and others.

Where a testator by his will charged all his real and personal estate with the payment of his debts, and then devised all his real and personal estate to his wife, for her life, or so long as she should remain his widow, and then directed that all his real and personal estate should be divided according to the statute of distribution, *in that case made and provided*:—Held, that by this will there was not any devise to any person of his real estate, after the death or marriage of his widow.

THE Vice-Chancellor sent the following case for the opinion of this Court:

John Thomas made his will, duly executed, and attested, to pass freehold estates by devise, in the words following: "I, *John Thomas*, do make, and declare this, my will and testament, in manner and form following. First, I charge all and singular my real and personal estate with the payment of all my debts; then, I give, devise, and bequeath, unto my brother, *Richard Thomas*, for and during the term of his natural life, an annuity, or clear yearly rent, or sum of 25*l.*, free of all taxes and other deductions, parliamentary or otherwise, to be issuing and payable out of certain lands therein mentioned and described, to be paid, and payable, by equal half-yearly payments, at the days therein mentioned. Also, I give, devise, and bequeath, unto my beloved wife, *Maria Letitia Thomas*, all my real estates, (and which he enumerated by name,) for and during the term of her natural life, or so long as she shall remain my widow. Also, I give, devise, and bequeath, unto my wife, the use and benefit of all interest of money, arising from my personal estate, either in bonds, mortgages, or simple contract debts; and also, the use and benefit of the household furniture of *Llanvaughan*, together with the stock, crop, and implements of husbandry, &c., that I shall be possessed of at the time of my decease, for and during her natural life, or so long as she remains my widow; and immediately after her decease, or in case of her marriage,

whichever shall first happen, then my will is, that all my real and personal estate be divided *according to the statute of distribution in that case made and provided.*" The testator was, at the time of making his will, and from thence until and at the time of his death, seised and possessed of the real estates therein specifically mentioned and devised to his wife during her life or widowhood, and of no other real estate. The testator died shortly after the date and execution of his will, without having revoked or altered the same, leaving *Maria Letitia Thomas*, his widow, and *James Thomas, Charles Lloyd Thomas, Richard Thomas*, and the Reverend *Thomas Seth Jones Thomas*, his four brothers, and only next of kin respectively, him surviving; and the said *James Thomas* was the eldest brother and the heir at law of the testator. Upon the death of the testator, *Maria Letitia Thomas*, his widow, entered into possession of his real estates, and continued unmarried and in possession thereof, and in the receipt of the rents and profits, until the time of her death. The testator's brothers having died leaving children them surviving, the suit in chancery was between the son of the eldest brother (the heir at law of the testator) and the children of the other brothers, who claimed as next of kin, and the representatives of the widow. The question for the opinion of this Court was, whether by the will of *John Thomas*, the testator, there was any devise of his real estates after the death or marriage of his widow, *Maria Letitia Thomas*; and, if any, to whom.

Tindal, for some of the next of kin. Two questions will be made upon this will. First, whether the real estate passed by the residuary clause, and second, if so, when it vested. First, the real estate clearly passed. The language of the clause is amply sufficient for that purpose, and amounts in substance to a devise to the next of kin of the testator, after the death or marriage of the widow. It is a well known principle, that formal words are not necessary to express the intention of the testator; it is sufficient, if, upon looking at the

1825.

THOMAS v. THOMAS.

will altogether, that intention becomes perceptible. It will be said, there is no designatio personæ here, because, as there is no statute of distributions applying to real property, there is no statute "in that case made and provided." But, as there is a statute of distributions, the Court will take notice of its existence, and will reject the words which follow and are applicable to it. The testator indissolubly connects his real and personal property, and his meaning plainly is, that the real property shall be divided among the same persons as the personal property would be divided among by the statute of distributions. If there had been a statute of distributions applying to real property, the devise would have been unnecessary, and the testator would not have inserted it. The evident intention is, that the real and personal property should pass together as one fund, for both are charged with payment of the testator's debts, and though the real estates are given to the wife separately and by a certain description, which, however, includes all that he ever possessed, the interest and profits of the personal estate are afterwards given to her also. So, the devise in question comprehends both the real and personal property, and as it proves clearly that the testator knew there was a statute of distributions applying to personal estates, the Court will treat the words "in that case made and provided" as mere words of description of that statute inserted by mistake, and consequently will reject them as surplusage. Many authorities to this effect may be cited. In *Smith* v. *Campbell* (*a*) it was held by Sir *William Grant*, M. R., that a bequest to the nearest relations of the testator in his native country, which was *Ireland*, extended to sisters of his who were resident in *America*. Then, if there is a sufficient designatio personæ, the objection that the words of the devise, strictly construed, apply to personal property, is not material; because there are many cases in which the Court, in order to effectuate the intention of the testator, have interpreted words so as to carry real estates, which in their

(*a*) Coop. Rep. in Ch. 275.

strict sense would carry only personal estates. *Doe* v. *Roper* (*a*), *Doe* v. *Langlands* (*b*), *Doe* v. *Trout* (*c*), and *Pyot* v. *Pyot* (*d*). The last mentioned case is particularly strong as an authority upon this point. That was a devise of real and personal estate in trust for a daughter in fee, but if she died before twenty-one, or marriage, then to the nearest relation of the name of *Pyot*. The daughter died before twenty-one or marriage. Held, that the devise over was not void for uncertainty, nor confined to a single person, but went to the stock of the *Pyots*, who were nearest, and that those who had changed their names of *Pyot* notwithstanding took with the rest. Lord Chancellor *Hardwicke*, in his judgment there, said, that *relation* was nomen collectivum as much as heir or kindred; that this was a trust both of real and personal estate; and suppose it had been a devise of personal only, all those persons who were in an equal degree of relation, of the name of *Pyot*, would be entitled to take equally; and the Court would have properly taken into consideration what would be the rule of distribution; that the Court being upon a question of construction who were the persons designed, the involving the personal in the same trust and devise was a circumstance determining the construction as to the real, and affording a proper key to find out who were the persons designed to take under the description, for the testator must have had but one intention; that the personal was involved with the real, and it was meant that both should go in the same manner; and should the personal go to the heir at law? That case therefore, in principle, applies very closely to the present, and shews, that when real and personal estates are blended, the devise of the personal is a proper key to explain how the real estate is to go. There is, however, one more recent case, which is completely decisive of the present, namely, *Doe* v. *Over* (*e*). There the testator devised all such

(*a*) 11 East, 518. (*b*) 14 East, 371. (*c*) 15 East, 394.
(*d*) 1 Ves. sen. 335. Cruise's Dig. VI. 185. S. C.
(*e*) 1 Taunt. 263.

1825.

THOMAS v. THOMAS.

property as he should be possessed of at his decease, except his freehold estates, to his wife, to be her sole property. And he gave to her all his freehold estates during her natural life, and at her decease to be equally divided amongst *the relations on his side*. It was held, that all those should take, who would be entitled to personal estate under the statute of distributions, as well in the maternal as in the paternal line; and that the devise spoke at the time of the testator's death, and not at the time of passing the devise. In the present case, it is perfectly clear that the testator did not intend to die intestate with respect to his real property; and as he has devised his personal property in such a manner as enables that to pass, his real property must be governed by that devise, and must pass in the same channel. Secondly, the devise vested at the time of the testator's death; that is, the devisees of the real estate are those who would have taken the personal estate under the statute of distributions, at the time when the will came into operation, namely, upon the death of the testator. *Doe* v. *Over* (*a*), and *Doe* v. *Sheffield* (*b*). The former of these cases has already been shewn to be an authority upon this point. In the latter, under a devise of land to the sisters of *J. H.* (generally), their heirs, &c., as tenants in common, and not as joint tenants, one of the three sisters of *J. H.*, who alone survived at the time of the devise made, and who also survived the testator, was held entitled to take the whole; and the Court said, that even if she had been only entitled to a part, the residue would not have gone to the heir at law, as in the case of a lapsed devise, but to the residuary legatee.

H. J. Stephen, for others of the next of kin. The will must be construed to affect the real estate; indeed it contains an express devise in terms of the real estate after the death or marriage of the widow. In *Doe* v. *Chapman* (*c*) there was no express devise of the lands in question, yet the Court held that they passed under the will; because, as the testatrix had two kinds of estates, namely, real and per-

(*a*) 1 Taunt. 263. (*b*) 13 East, 526. (*c*) 1 H. Bl. 223.

1825.

THOMAS v. THOMAS.

sonal, to which the words "all the rest of my estate of what kind soever" might be applied, they could not restrain the meaning of them to personal property, and negative the operation of them as to real estates. That is a stronger case than the present. The argument on behalf of the heir at law will be, that as there is no statute of distribution applying to this case, the words "divided according to the statute of distribution in that case made and provided," must be read as meaning, divided according to law; and consequently that the real estate must go to the heir at law. In order to give a sensible construction to this will, the Court must omit either the words "in that case made and provided," or the words "according to the statute of distribution." Now, to omit the latter words would be, to do violence to the will, because they apply both to the real and persoual property; whereas, to omit the former, would be only to read the will as if it were a devise of the real property "to my next of kin," which was evidently, taking the will altogether, the intention of the testator. The devise then gives the real estate to the next of kin in such a manner as the law would divide the personal estate among them, and that is in exclusion both of the heir at law and of the widow, because there is a previous express devise to the widow for life, and that cannot be enlarged except by subsequent words equally express for that purpose, *Worsley* v. *Johnson* (a). In *Doe* v. *Lawson* (b) the testator devised real estate to his nephew for life, and after his decease, then, for, and among *such person and persons*, his, and their heirs, &c., *as should appear and could be proved to be his next of kin, in such proportions as they would, by virtue of the statute of distributions, have been entitled to his personal estate if he had died intestate:* and it was held, that the distribution was to be made among those who were the testator's next of kin *at the time of his death.* So, in the present case, the devise must be construed so as to take effect at the time of the testator's death; therefore it would be absurd to say, that

(a) 3 Atk. 758. (b) 3 East, 278.

1825.
THOMAS v. THOMAS.

the widow took any thing more than a life estate, because, if she took the fee in a moiety of the real estate, that would, in case of her death, have gone to her representatives, for whom it is clear the testator had no intention to provide. It cannot here be contended, that the real estate passed to the heir at law, subject to a power of sale, for the words "to be divided" do not amount to a devise of a power of sale; in order to give that power, there must be express words to that effect. *Co. Litt.* 236. a. *Camfield* v. *Gilbert* (a).

Barnewall, for the representatives of the widow. It is unnecessary to repeat, and it would be difficult to extend the arguments already offered, to shew that the real estate passed; but if it did pass, then the representatives of the widow are entitled to the same share of the real estate, as the widow herself would have taken of the personal estate under the statute of distributions. Now the widow would have taken a moiety of the personalty, therefore her representatives are entitled to a moiety of the realty; otherwise, the main object of the testator must be defeated, for the estate cannot be "divided according to the statute of distributions." It has been repeatedly held in cases of devises to next of kin, and to relations, that the testator's wife does not come within either of those descriptions; *Davies* v. *Baily* (b), *Worsley* v. *Johnson* (c), and *Garrick* v. Lord *Camden* (d); but none of those cases touch the present, because here the estate is simply to be divided according to the statute of distribution, without any limitation to relations, or to next of kin; here, therefore, is nothing to exclude the widow as there was in those cases. *Doe* v. *Lawson* is a strong authority to shew that the distribution of the estate ought to be among those who would have been entitled at the time of the testator's death, and not at the time of the death of the widow; and with the single substitution of the word "wife" or "widow," for the word "nephew" in that case, it is hardly possible to distinguish it either in fact or in prin-

(a) 3 East, 515.
(b) 1 Ves. sen. 84.
(c) 3 Atk. 758.
(d) 14 Ves. jun. 372.

ciple from the present. It is therefore confidently submitted, that the widow in this case was entitled at the death of the testator to a life estate in the whole of the realty, and to a remainder in fee in a moiety of it.

Peake, Serj., for the heir-at-law. The real estate did not pass by the residuary clause. It is a general rule too well known and established to need either authorities or arguments in support of it, that the heir at law cannot be disinherited but by express words or necessary implication (*a*). Here, it is admitted, there are no express words, and it cannot be successfully contended that there is any necessary implication, for such a purpose. The mere fact of the testator's connecting his real and personal estate in some parts of his will, does not prove that he intended to do so in others; and so far as any intention can be deduced from language so informal and incongruous as he uses, it rather appears that he intended not to disinherit his heir-at-law. He first gives his wife, either for her life, or while she remained his widow, every thing that he possessed; and then says, "and after her decease, or in case of her marriage, whichever shall first happen, then my will is, that all my real and personal estate be divided according to the statute of distribution in that case made and provided:" not merely, "according to the statute of distribution," but, "according to the statute of distribution *in that case made and provided.*" As there is no statute for the distribution of real estate, it is clear that the testator was ignorant of the meaning of the words he used; but he doubtless thought, that the statute of distribution did apply to real as well as personal property, and therefore meant to say, merely, that his real and personal estate should go in the course provided by law, that is, the real estate to his heir-at-law, and the personal estate amongst his next of kin. Such a construction of the clause gives effect to every part of it; and there is no reason for supposing, that he wished to alter the distribution of the

(*a*) See the judgment of *Best*, J. in *Doe* v. *Turner*, ante, vol. ii. 398.

1825.

THOMAS v. THOMAS.

law in one case more than in the other. The word "divided," does not necessarily imply a division of both estates, real and personal, among different persons: it may mean the division or separation of the one from the other for the purpose of their going each as the law directs; and such a construction satisfies the meaning of the word, and the object of the testator in using it. In *Piggot* v. *Penrice* (*b*) the testatrix by will devised in this manner, "I make my niece executrix of all my goods, lands and chattels." It appeared, that the testatrix had no term or interest for years in any lands whatsoever, but she had an estate of inheritance in the lands in question. It was held, that the lands did not pass under this devise. It was argued, that unless the lands passed, the word "lands" would be useless and must be rejected, which ought not to be, for the testatrix in using it, must have had some meaning. To this the Lord Chancellor answered, that the word "lands" was not useless, or to be rejected, for that there might be rents in arrear of the lands, and by holding that the rents would pass, the words of the will would be satisfied. In the present case it is said, that the testator has treated both estates as one, and has disposed of them together; undoubtedly he has done so, but no farther than was necessary to promote the objects he had in view. He thought that his personal property, the amount of which the case does not state, might be inadequate to the payment of his debts, and therefore, for the benefit of his creditors, and for that purpose only, he made his real property liable to the payment of his debts. He was desirous that his widow should live in comfort and independence, and should be able to maintain an establishment after his death, equal to that which she had shared with him during his life, and therefore, in order to secure to her such an establishment, and for that purpose only, he bequeathed to her the use, not only of his personal, but of his real estate also, during her life or widowhood. But it cannot be inferred from either of these acts, that he meant both estates

(*a*) Prec. in Ch. 471.

1825.

THOMAS v. THOMAS.

to go together after her death, or that he wished his real estate to be ultimately parcelled out like his personal property. *Pyot* v. *Pyot* is very distinguishable from the present case, because there the two estates were united by the testator for the express purpose of making a provision for one particular individual, namely, the nearest relation of his own name. Can it be supposed, that this testator had so absurd an intention as to divide a small estate into several small portions, so as to render his bounty equally useless to all the objects of it? Yet such must be the effect, if his real estate is to be divided in the same manner as his personal. If he had intended the real estate to be divided amongst all his next of kin, he would have given directions for the sale of it for that purpose, for otherwise his intention could never be carried into execution; yet there are no words in the will which convey a power of sale. If that was not his meaning, there is no meaning at all to be collected from the will, and then the heir at law is entitled, because there is no implication sufficiently plain or strong to disinherit him. Besides, in that view of the case, the devise is wholly void for uncertainty; *Doe* v. *Joinville* (a); and on that ground the heir-at-law is entitled. It is sufficient for the heir-at-law that the devise is generally uncertain; it is for other claimants to make out a clear intention to disinherit him: and that not being done, his title remains complete.

Tindal, in reply. The testator could not have thought that there was a statute regulating the distribution of real property: if he had, he would have used the word *statutes*, in the plural number. A division of the real estate from the personal will not satisfy the meaning of the word "divided;" it must mean a division of both estates among several parties. It is quite clear that the words of the devise in *Piggot* v. *Penrice* were insufficient to pass the land; the only effect of that case is to shew that the Courts are always

(a) 3 East, 172.

1825.
THOMAS v. THOMAS.

anxious, if possible, to give operation to the words of a will, and to prevent a testator from dying intestate. *Doe* v. *Joinville* is inapplicable to the present case; if the devise there had been to next of kin, it would have been held good, for the doubt was as to the proportions of the estate, and the uncertainty was as to which of two families the testator intended to take. It has, however, been doubted whether the word "family" is not sufficient; and the propriety of the cases where the contrary has been held, has since been questioned by the Lord Chancellor: *Wright* v. *Atkins* (a). The devisees, therefore, take the fee immediately, and though the devise vested at the time when the will took effect, namely, at the death of the testator, that gives the representatives of the widow no claim, because it is manifest that the testator intended her to take that which he gave her, and no more.

BAYLEY, J.—I lay no great stress upon the fact of the testator's having charged both his real and personal estate with the payment of his debts, nor of his having given both to his wife for her life; for I cannot infer from thence that he intended his real estate to be ultimately divided into parcels, and that aliquot parts of that and of his personal estate should finally go together. The rule of law is clear, that in order to pass real estate, it must appear plainly on the face of the will, what is to pass, and to whom. If the words of the will are insufficient to designate with certainty the property intended to be passed, and the person intended to take it, then real estate will not pass, but must descend to the heir-at-law; not because the heir-at-law is the favourite of the law, but because the devise itself is void for uncertainty. Then the question here is, whether there are any words in this will clearly and certainly designating the person to whom the real estate is intended to pass. Had the testator said, "I give all my real estate to be divided according to the statute of distribution," omitting the words "in

(a) Turner's Ch. Ca. 156.

1825.
THE v. THOMAS.

that case made and provided," he would have expressed his intention clearly and beyond doubt; but reading the sentence altogether, as it stands, it is plain that he has made use of words, the meaning of which he did not understand. The probability, I think, is, that he thought there was one statute which regulated the distribution both of real and personal property, and that he meant his property of both kinds to be divided as the law would divide it. At present, therefore, I am of opinion that the will operates only as a bequest of the personal estate, and that it does not pass the real estate. We will, however, consider further of the case, and afterwards send our opinion to the Vice-Chancellor.

The following certificate was afterwards sent:

"This case has been argued before us by counsel, and we are of opinion that by the will of *John Thomas*, the testator, there was not any devise to any person or persons of his real estates after the death or marriage of his widow, *Maria Letitia Thomas*.

J. BAYLEY.
G. S. HOLROYD.
J. LITTLEDALE."

DOE, on the several demises of LAWRENCE and others, *v.* SHAWCROSS.

It is no ground of nonsuit, in an action of ejectment, that the service of the declaration is on a day subsequent to that of the demise to *John Doe*, if it appears that there is rent in arrear, and no distress on the premises, at the time the declaration is served. The stat. 4 *G.* 2. c. 28. s. 8. substitutes the service of a declaration in ejectment in lieu of a formal demand of rent, to work a forfeiture.

THIS was an ejectment by the assignees of the reversion of certain premises in the county of *Lancaster*. Plea, the general issue. At the trial before *Hullock*, B. at the last *Summer* assizes for *Lancashire*, it appeared in evidence that the defendant was tenant of the premises in question, under a lease by which the rent was payable at *Lady-day* and *Michaelmas*, with a proviso for re-entry in case the rent

1825. DOE v. SHAWCROSS.

should remain in arrear by the space of thirty days. At *Lady-day* last year, half a year's rent becoming due and in arrear, and there being no sufficient distress on the premises, the present action was brought. No demand of rent had been made on the premises. The demise was laid on the 10th *May*, but the declaration was not served until the 14th *May;* whereupon it was objected for the defendant that the lessor must be nonsuited, inasmuch as his title to sue could not arise until after the service of the declaration, and therefore he had no right to lay his demise on the 10th *May*. The learned Judge was at first clearly of opinion that the objection was fatal, [in which opinion the plaintiff's counsel immediately acquiesced] and directed a nonsuit accordingly, but upon after consideration his lordship thought otherwise, and gave leave to move to set aside the nonsuit, and obtain a new trial.

F. Pollock, in *Michaelmas* Term last, obtained a rule nisi to set aside the nonsuit, and enter a verdict for the lessor of the plaintiff, against which

Cross, Serjt. and *Starkie* now shewed cause. The question is, whether the plaintiff has a right to lay his demise before the day on which the declaration is served. It is perfectly clear that at common law, before the plaintiff could recover as for a forfeiture, he must have proved a demand of the precise rent on the premises, on the day it became due, which, according to the terms of the lease here, would be the 24th *April*. Till then no forfeiture could have accrued, and consequently, before that day, the demise to *John Doe* could not be laid. But though the statute 4 *Geo.* 2. c. 28. s. 2. (*a*) declares that the service of a

(*a*) By which it is enacted "that in all cases between landlord and tenant, as often as it shall happen that one half year's rent shall be in arrear, and the landlord or lessor to whom the same is due hath right by law to re-enter for the non-payment thereof, such landlord or lessor shall and may, without any formal demand or re-entry, serve a declaration in ejectment for the recovery of the demised premises, which service shall stand in the place and stead of a demand and re-entry."

declaration in ejectment shall be equivalent to, and stand in the stead of a demand of the rent, still it can only be equivalent to, and stand in the stead of, such a demand as would be *effectual* at common law. No demand would be effectual at common law before the 24th *April*, and therefore, unless the declaration was delivered before the demise was laid, the landlord would have no title. It is clear that if the service of the declaration is, by the statute, to stand in lieu of a demand of rent, the plaintiff can have no right to lay his demise before the declaration is served, for until then no forfeiture accrues. On this short ground the plaintiff was properly nonsuited, for he has laid his demise before the service of the declaration. [*Littledale*, J. The object of the act of parliament was to dispense with the demand of rent altogether.] The effect of that would be to make the tenant a trespasser by relation, which would be a proposition of some novelty. [*Littledale*, J. And so he is. It is the tenant's duty to pay his rent on the day it is due. Here it was due on the thirtieth day; and if he did not pay it then, the act of parliament was intended to put the landlord in the same situation as if on that day he had made a regular and formal demand. If on that day the rent was not paid, he had a right of entry; and by continuing in possession the tenant becomes a trespasser. The object of the statute was to dispense with all the formality which the common law had imposed upon landlords; and all that the landlord has to do if he wishes to enforce his right of eviction, is to serve a declaration, and if there is no distress on the premises, he is entitled to recover possession, just exactly as if he had made a formal demand on the day the rent became due. It is clear that in this case the declaration must have been served in proper time, for otherwise the tenant was not bound to appear. Indeed the clerk of the rules would not draw up the rule unless that was so. The defendant must have appeared before the essoin day of the term.] At all events the plaintiff having in this case elected to be nonsuited, he must abide by the consequences, and cannot

1825.

DOE v. SHAWCROSS.

have a new trial. In *Butler* v. *Dorant* (*a*) it was held that if, upon the judge directing the jury to give nominal damages, the plaintiff elects to be nonsuited, he will not be permitted to have a new trial upon the ground of a misdirection of the judge on that point.

F. Pollock, contrà. The answer to the last topic is, that the plaintiff did not elect to be nonsuited, but yielded in deference to the opinion at first decidedly expressed by the learned judge that the objection was fatal. The plaintiff, therefore, cannot be concluded on that ground, even supposing such a rule as that relied upon was applicable to an action of ejectment. It is clear that this ejectment was without any other defence than the technical objection which was taken to the form in which the demise was laid, and as that objection is now clearly without foundation, the Court will direct a verdict to be entered for the plaintiff. At all events, if there is to be a new trial granted, they will put the defendant under the terms of allowing the judge's notes of the trial at the last assizes to be read at the next trial, without compelling the plaintiff to go to the expense of bringing his witnesses to prove the same facts a second time. In an ejectment such terms may be imposed, because this species of action differs from others, inasmuch as the defendant in ejectment is always let in to defend on conditions. [Here the Court stopped him upon the objection as to the form of the demise.]

BAYLEY, J.—I think we are not at liberty to direct a verdict to be entered for the lessor of the plaintiff. If, in the progress of a cause, an objection is taken which goes to a nonsuit, the learned judge who presides may, if he thinks proper, impose upon the defendant as a condition, *before he nonsuits, that the defendant must consent that there shall be a verdict entered for the plaintiff, if the Court* out of which the record comes, is of opinion that the non-

(*a*) 3 Taunt. 229.

suit is wrong; but that condition cannot be imposed without the consent of the defendant's counsel, before the trial is terminated. Now here there was no such consent, and therefore we have no authority to direct a verdict to be entered for the plaintiff. I am also of opinion that we are not at liberty to impose any terms on the defendant, for he is now in possession of a nonsuit. It is said that the action of ejectment differs from other actions, because the defendant is always let in upon conditions, and is therefore liable to have terms imposed upon him. Terms may be imposed upon him at the period he is let in to defend, and the Court is in the habit of doing so in particular cases, but it is not because, with a view to the general administration of justice, the Court is in the habit of imposing certain terms applicable to all actions of ejectment, that we can in this case compel the defendant to forego an advantage or give up a right which he has acquired by the course which the case took at the former trial. I have no doubt, however, that the nonsuit must be set aside. With respect to the case of *Butler* v. *Dorant*, that is perfectly different from the present, because there the plaintiff having a right to the verdict, but finding that he could only recover nominal damages, thought proper to prefer being nonsuited. It was properly held, therefore, that he was not entitled afterwards to have the nonsuit set aside, because it was his own act, and not drawn on by the judge or the adverse party. Here the nonsuit was submitted to in deference to the opinion expressed by the learned judge, and therefore the being nonsuited was not a matter of volition on the part of the plaintiff. With respect to the objection raised at the trial, I am clearly of opinion that it has no foundation. The statute 4 *Geo.* 2. c. 28. was passed in the year 1731, and I believe from that time until the present occasion, it never entered into anybody's mind, that it was essential that the day on which the demise is laid, in an action of ejectment, must be the day on which the declaration is served. I take it to be perfectly clear that it could not be after that day, because it

1825.

DOE v. SHAWCROSS.

would then appear in evidence that the nominal plaintiff had no title at the time of the service. In point of practice, hitherto, I believe the universal course has been to lay the demise on an earlier day. If this were a valid objection, it might have been taken in *Doe* v. *Fuchau* (a), and I believe in every action of ejectment brought since the passing of the act. In *Doe* v. *Fuchau* the declaration was served on the 6th *June*, and the demise was laid on the 2d *May*. It is true that at common law the demand in this case must have been made on the 24th *April;* but the statute enacts "that the service of the declaration in ejectment shall stand in the place of the demand and re-entry." That clearly means such a demand as would be *effectual* at common law; namely, a demand on the day the rent became due. This is manifestly the meaning of the statute, when we refer to the subsequent part of the same section which enacts "that if it shall be proved upon the trial that half a year's rent was due before the said declaration was served, and that no sufficient distress was to be found on the demised premises, countervailing the arrears then due, and that the lessor or lessors in ejectment had power to re-enter, then and in every such case, the lessor or lessors in ejectment shall recover judgment and execution in the same manner as if the rent had been *legally* demanded, and a re-entry made." It is obvious that if the rent in this case had been legally demanded on the 24th *April*, the lessor of the plaintiff might recover on a demise laid on the 10th *May;* but it is said he cannot recover, because the declaration is not served until the 14th *May*. That cannot be, because then he would not be entitled to recover according to the provision of the act, "in the same manner as if the rent had been legally demanded." Here the plaintiff's title had accrued on the 24th *April*, the rent not being then paid; and as the act substitutes the service of the declaration in place of a legal demand, the time when the service of the declaration takes place is not essential to the plaintiff's title to maintain the action. The sta-

(a) 15 East, 286.

tute does not render it necessary to prove the time when the declaration is served. All that the plaintiff need prove, in order to entitle him to recover, is, that half a year's rent was due before the service of the declaration, that no sufficient distress was upon the premises, and that he had a power of re-entry. These facts were proved by the plaintiff, and that was quite enough. For these reasons I am of opinion that the true construction of this act (and which for the last ninety-five years has been the invariable construction put upon it) is, that the service of the declaration in ejectment is equivalent to that which before the statute would be a legal demand of rent; namely, a demand on the day when the forfeiture was to arise if the rent was not paid when so demanded.

HOLROYD, J.—I am also of opinion that there cannot be a verdict entered for the plaintiff, because the liberty of doing so was not reserved at the trial, nor was the defendant's consent obtained for that purpose. I likewise think that we have no authority to impose any terms on the defendant in granting a new trial. As to the construction of the statute, I take it to be perfectly clear that the object of it was to dispense with the necessity of a demand by the landlord, and at the same time not to put the tenant in a worse situation than he would have been in if he had tendered the rent when it ought to have been paid. The statute meant to substitute the service of the declaration in ejectment in the place of a legal demand of rent at common law, but it did not intend thereby to place the tenant in a worse situation, for until the service of the declaration no forfeiture would be worked; and if, when the declaration is served, he is ready to pay his rent, although he did not tender it when it was due, he is entitled to the same advantage as if he had tendered it at that time. The statute is, therefore, beneficial both to the landlord and tenant; first, in relieving the former from the necessity of going through all the formalities which were required at common law before

1825.

Doe v. Shawcross.

a forfeiture could be worked; and second, in protecting the latter from forfeiture until the declaration is served, from which he may relieve himself by then paying the rent. At common law the rent must have been demanded on the 24th *April*, but the necessity of that is dispensed with by the statute which substitutes the service of the declaration in lieu thereof, and gives the landlord the same right to recover as if the rent had been demanded on that day. If the landlord had demanded the rent on that day, it is clear that at common law he would have been entitled to recover, though the day of the demise in the declaration was prior to the demand. It follows then, that as the service of the declaration is to have the same effect as a demand of rent, the demise may be laid on a day prior to the service of the declaration.

Littledale, J. concurred.

Rule absolute for a new trial.

Three other objections were taken by the defendant's counsel in argument, arising from the circumstance that the lessors of the plaintiff, five in number, were assignees of the reversion: first, that the right of re-entry is not assignable at common law; second, that it is not assignable under the statute 32 *Hen.* 8. c. 34, without notice to the tenant; and third, that it is not assignable to an indefinite number of persons. Upon these points the Court gave no opinion, intimating that, if they were of any weight, they might be taken advantage of on the new trial. The authorities cited were *Com. Dig.* tit. *Condition*, L. 8; 3 *Leo.* 96; 5 *Rep.* 113; 8 *Rep.* 92; *Co. Lit.* 214.

WILLIAMS *v.* Lord BAGOT (in error).

A custom in an inferior court for the plaintiff, in an action of debt, to issue a summons and attachment on the same day, returnable on the same day, and at the return of those writs without either of them having been personally served on the defendant, and without the defendant having appeared, to declare and afterwards sign judgment by default, was held bad in law, and the judgment reversed upon writ of error.

WRIT of error from the Court of the lordship of *Ruthin*. Pursuant to a rule of this Court, ordering a certiorari to issue to the steward of the court of the lordship of *Ruthin*, to certify the practice of that court, and to amend the record in the cause, with leave to the plaintiff in error to assign errors anew (*a*), the following record and certificate were sent:

Lordship of *Ruthin*, otherwise *Dyffryn Clwyd*. Pleas of our lord the King in and for the lordship or dominion of *Dyffryn Clwyd*, with the town of *Ruthin*, in the county of *Denbigh*, held at *Ruthin*, in the lordship aforesaid, the 2d of *November*, 1822, according to the use and custom of the same lordship, hitherto used and approved, from time whereof the memory of man is not to the contrary, before *R. H. Jones*, Esq. chief steward of the said court.

Be it remembered, that heretofore, to wit, on the 7th day of *September*, in the year of our Lord 1822, at the court of the lordship or dominion aforesaid, holden at *Ruthin* aforesaid, in and for the lordship aforesaid, and within the jurisdiction of the same court, before *R. H. Jones*, steward of the said court, came the Right Honourable *William* Lord *Bagot*, by *J. Jones* his attorney, and then and there made and levied his certain plaint against *John Williams*, Gent. in a plea of debt of 4,000*l.*, an affidavit that the sum of 2,000*l.* and upwards was then due and unsatisfied from the said *J. Williams* to the said Lord *Bagot* having been first duly made and filed in the said court of the said lordship or dominion, which said plaint and affidavit are as follows:

In the lordship court of *Ruthin*, otherwise *Dyffryn Clwyd*, 7th *September*, 1822, the Right Honourable *William* Lord *Bagot* complains against *John Williams*, Gent. in a plea of

(*a*) Vide ante, vol. iv. 315, S. C.

1825.

WILLIAMS v. LORD BAGOT.

debt of 4,000*l.* *John Jones*, plaintiff's attorney, by distringas oath for 2,000*l.* and upwards.

In the lordship court of *Ruthin*, otherwise *Dyffryn Clwyd*, *Thomas Turner*, of *Bagot's Park*, in the parish of *Abbotts Bromley*, in the county of *Stafford*, gentleman, maketh oath and saith, that *John Williams*, now, or late, of *Pool Park*, in the parish of *Llanfurog*, in the said lordship of *Ruthin*, and within the jurisdiction of this court, gentleman, is justly and truly indebted unto the Right Honourable *William* Lord *Bagot*, in the sum of 2,000*l.* and upwards of lawful money, for money had and received by the said *John Williams*, to and for the use of the said Lord *Bagot;* and this deponent further saith, that no offer or tender hath been made to pay the said sum of 2,000*l.* or any part thereof, either to the said Lord *Bagot*, or to this deponent, or any other person on the behalf of the said Lord *Bagot*, in any note or notes of the governor and company of the Bank of *England*, expressed to be payable on demand.

And upon this, the said *William* Lord *Bagot* prays the process of the same court, to be made to him thereupon against the said *John Williams* in the plea aforesaid; and it is granted to him, and so forth: and upon this a certain summons is issued by the said court, as follows:—

Lordship of *Ruthin*, otherwise *Dyffryn Clwyd.* To *John Williams*, Gent. You are hereby summoned to be and appear at the next court to be held and kept in and for the said lordship, to answer the Right Honourable *William* Lord *Bagot* in a plea of debt of 4,000*l.* whereof you have this summons, dated the 18th day of *September*, 1822.

From *Edward Jones*, recorder there; *John Jones*, attorney; *John Maddocks* and *Thomas Turner*, bailiffs.

By distringas.

Which said summons is thereupon delivered to the said *Thomas Turner* and *John Maddocks* to be by them, or one of them, served upon the said defendant, according to the custom of the said court; and upon this a precept of at-

tachment is, according to the custom of the court, issued by the same court as follows:—

Lordship of *Ruthin*, otherwise *Dyffryn Clwyd*. Between the Right Honourable *William* Lord *Bagot*, plaintiff, and *John Williams*, defendant, in a plea of debt of 4,000*l.* It is commanded on the part and behalf of the lady of the said lordship, to all and singular the bailiffs and ministers there, and also to *Thomas Turner*, *John Maddocks*, *Robert Jones*, and *John Jones*, for this time specially appointed, that you, some or one of you, attach the said defendant by his goods or chattels, if found within the said lordship, and them safely keep, so that the defendant be and appear by good and sufficient sureties, at the next court to be held for the said lordship, before the steward of the lordship aforesaid, to answer to the above-named plaintiff in the plea above-mentioned, and have you there this precept. Witness, *R. H. Jones*, Esq. chief steward of the said lordship, at *Ruthin*, the 7th day of *September*, 1822.

Edward Jones, Recorder there.

Issued 18th of *September*, 1822. Oath for 2,000*l.* and upwards. Which said attachment is thereupon delivered to the said *Thomas Turner* and *John Maddocks*, to be by them, or one of them, executed according to such custom. At which said court, to wit, at the court of the said lordship holden at *Ruthin* aforesaid, in the county of *Denbigh* aforesaid, and within the jurisdiction of the said court, on the 21st day of *September*, in the said third year of the reign of our said lord the King, before *R. H. Jones*, Esq. steward of the said court, comes the said *William*, Lord *Bagot*, by *John Jones* his attorney, and offers himself against the said *John Williams* in the plea of the said plaint. And the said *Thomas Turner*, being such bailiff as aforesaid, now informs the same court here upon oath, that he did, on the 18th day of *September* in the same year, summon the said *John Williams*, by delivering a true copy of the said summons to the wife of the said *John Williams*, in his dwelling-house, within the jurisdiction of the same court, according to the

1825. WILLIAMS v. LORD BAGOT.

tenor of the said summons, and by shewing to her, then and there, the original summons. And he further informs the said court upon oath, that he did, on the said 18th day of *September* in the year aforesaid, in all things execute the said precept of attachment so to him directed, by then shewing to the said wife of the said defendant in his said dwelling-house, the said writ or precept of attachment, and delivering her a true copy thereof, and by virtue thereof, within the jurisdiction aforesaid, taking possession of the goods and chattels of the said defendant, according to the usage and custom of the said court; and that the same continue in the custody of the said *Thomas Turner*. At which same court, to wit, at the court of the lordship aforesaid, held at *Ruthin*, in and for the said lordship, and within the jurisdiction of the same court, on the aforesaid 21st day of *September*, in the said third year of the reign of our said lord the now King, before *R. H. Jones*, Esq. steward of the said lordship, comes the said *William* Lord *Bagot*, by *John Jones* his attorney, and hereupon the said *William* Lord *Bagot* declares against the said *John Williams*, in the plea of the said plaint, in manner and form following, that is to say:

In the lordship court of *Ruthin*, otherwise *Dyffryn Clwyd*, in the county of *Denbigh*. For the Right Honourable *William* Lord *Bagot*, plaintiff, against *John Williams*, gentleman, defendant, in a plea of debt of 4,000*l*.; and hereupon the said plaintiff, by *John Jones* his attorney, complains, for that whereas the said defendant on the 20th day of *July*, in the year of our Lord 1822, at *Ruthin*, in the said county of *Denbigh*, and within the jurisdiction of this court, *did grant himself to pay*, to the said plaintiff, the said sum of 4,000*l*. of lawful money of *Great Britain*, whensoever afterwards he, the said defendant, should be thereunto requested; nevertheless, the said defendant, although oftentimes afterwards thereunto requested, hath not yet paid to the said plaintiff the said sum of 4,000*l*. or any part thereof, but the same to him to pay hath hitherto refused, and still doth refuse; wherefore the said plaintiff saith he is injured

and hath sustained damage to the value of 4,000*l*. and therefore he brings his suit, and so forth, pledges to prosecute *John Doe* and *Richard Roe*. But the said *John Williams*, though solemnly called by the Recorder, and afterwards by the crier of the said court, cometh not; whereupon a day is given to the said *John Williams* to appear in the said plaint until the next court of the lordship aforesaid, to be holden in and for the lordship aforesaid here, and within the jurisdiction of the same court, to wit, at &c. on the 5th day of *October* now next ensuing. The same day is given to the said *William* Lord *Bagot* to be there and so forth. At which same next court, to wit, at the court of the said lordship holden before the said *R. H. Jones*, steward of the said lordship as aforesaid, and within the jurisdiction of the same court, to wit, at &c. on the said 5th day of *October*, in the year aforesaid, comes the said *William* Lord *Bagot*, by his attorney aforesaid, but the said *John Williams*, though as aforesaid solemnly called, cometh not, whereby the said *William* Lord *Bagot* remains therein undefended against the said *John Williams*; therefore it is considered according to the custom of this court, that the said *William* Lord *Bagot* do recover against the said *John Williams* his said debt, and also 6*l*. 18*s*. for his damages which he has sustained, as well on occasion of his detaining the said debt, as for his costs and charges by him about his suit in this behalf expended, by the court here adjudged to the said *William* Lord *Bagot*, and with his assent. And the said *John Williams* in mercy and so forth. And, thereupon, by a certain verification duly made on the part and behalf of the said *William* Lord *Bagot*, by the oath of the said *Thomas Turner*, sworn before *Edward Jones*, Esq. Recorder of the said court of the said lordship, and duly filed in the said court, it is manifest, and made manifest to the said court, that the sum of 3,400*l*. of lawful money of *Great Britain*, besides the ordinary costs of suit, is still due and unpaid to the said *William* Lord *Bagot*: and thereupon it is commanded to *Thomas Turner*, *John Maddocks*, and other bailiffs, that they, or some or one

1825.
WILLIAMS
v.
LORD BAGOT.

of them, of the goods and chattels of the said *John Williams*, if found in the said lordship and jurisdiction, cause to be made, as well the said debt of 4,000*l.* as also the said sum of 6*l.* 18*s.* which to the said *William* Lord *Bagot*, in the said court was awarded for his costs and damages as aforesaid, and whereof the said *John Williams* was convicted as aforesaid; and that they have the same money at the next court to be holden for the said lordship, to be rendered to the said *William* Lord *Bagot*, for the debt, damages, and costs aforesaid, and that they have there this precept. And the said writ was then and there indorsed by the said court "to levy" the sum of 3,406*l.* 18*s.* being the amount of the said sum so as aforesaid verified, and of the costs and damages so as aforesaid by the said court awarded to the said *William* Lord *Bagot*. And afterwards, at the said court, to wit, at the said court of the said lordship, holden before the said *R. H. Jones*, steward of the said lordship as aforesaid, and within the jurisdiction of the same court, to wit, at *Ruthin* aforesaid, in the county aforesaid, on the 2d day of *November*, in the third year aforesaid, come the said *Thomas Turner* and *John Maddocks*, and inform the court, that, by virtue of the said writ, they have caused to be made, of the goods and chattels aforesaid of the said *John Williams*, the sum of 1,416*l.* which money they have ready before the steward of the said lordship, at the day and place within contained, to render to the said *William* Lord *Bagot*, in part of his debt and costs in the said writ mentioned. And they further certify that the said *John Williams* has not any other or more goods or chattels within the said lordship, whereof they can cause to be made the residue of the said debt and costs aforesaid, according to the exigency of the said writ.

The answer of *Thomas Turner* and *John Maddocks*.

R. H. Jones.

Assignment of special errors. That by the record it appears, that a summons and also an attachment issued out of the court of the lordship on one and the same day in one

and the same suit; which two processes are inconsistent with each other, and cannot by law be issued together. That process against the person, and process against the goods, of the said *John Williams,* issued out of the court of the lordship at one and the same time. That inconsistent processes, the one being bailable, and the other not being bailable, issued out of the court of the lordship at one and the same time. That process of attachment against the goods of the said *John Williams* issued out of the court of the lordship before the process of summons against his person was returnable. That two inconsistent processes were served upon the said *John Williams* at one and the same time. That although no appearance was ever entered in the court of the lordship by or on behalf of the said *John Williams* at the suit of the said *William* Lord *Bagot* in the said plaint, yet the said *William* Lord *Bagot* proceeded to declare and to sign judgment against the said *John Williams,* he, the said *John Williams,* never having appeared or been in any manner brought into or before the court of the lordship. That in the said record, there is not any entry of any appearance by, or on behalf of the said *John Williams,* in the said suit, whereas, by the laws of this land, an appearance ought to be entered by, or on behalf of a defendant, in order to entitle plaintiff to declare against him, and to sign judgment against him as for want of a plea. Assignment of common errors, and joinder in error.

Return to the certiorari. The court of the lordship of *Ruthin* is, and from time immemorial hath been, holden before the steward, who officiates as judge thereof once every fourteen days, that is, on every alternate *Saturday;* and by the custom and usage of the court from time immemorial, a creditor may sue for a debt amounting to, or exceeding the sum of 40*s.*, at any intervening time between the holding of the two courts. And after having duly made and filed an affidavit that a sum of money is justly due to him from a debtor, he, by his attorney, may levy a plaint

1825.

WILLIAMS v. LORD BAGOT.

against such debtor, as of the next preceding court day, which the recorder of the court enters in the court book under the title of the next preceding court day; whereupon a summons from the recorder to the defendant issues, according to such usage and custom, whereby the defendant is summoned to appear at the court to be holden next immediately after the date of the summons, to answer the plaintiff in a plea of debt, and which is tested on the day it issues; and at the same time a writ of attachment, according to such usage and custom, issues under the hand and seal of the recorder, tested before the steward on the next preceding court day, and dated in the margin the day and year on which it is actually issued, whereby the bailiffs therein specially appointed, are commanded to attach the defendant by his goods and chattels, if found within the lordship, and them safely keep, so that the defendant be and appear by good and sufficient sureties at the next court to be held for the lordship before the steward of the lordship, to answer to the plaintiff therein named in the plea therein mentioned; and which is tested on the next preceding court day. The summons bears in the margin the name of the particular bailiff to whom the writ of attachment is directed, and who is appointed to serve the summons and execute the attachment, which service and execution are, according to such usage and custom, effected within the limits and jurisdiction of the same court, either by shewing the original summons and attachment to the defendant, and giving a copy of the summons to him personally, and taking possession of his goods and chattels equal in value to the debt sworn to and costs, or, by shewing the original summons and attachment to the defendant's wife in his dwelling house, and giving her a copy of the summons in his dwelling house, and taking possession of such his goods and chattels. If the defendant, according to the exigency of the writ of attachment, gives sufficient sureties to appear and satisfy the plaintiff, if the latter should obtain a verdict or judg-

ment in the said plaint, the condemnation money, being debt, damages and costs, then the goods and chattels so taken or attached, are immediately given up and restored to the defendant. The defendant is, however, at liberty to appear and proceed to trial without putting in such bail, if he chuses to permit his goods and chattels to remain in the custody of the bailiff to abide the event of the suit. At the next court holden in and for the lordship, after the service of the summons and the seizure under the attachment, the bailiff informs the court, upon oath, of the time and manner of such service and seizure, and the plaintiff is then at liberty, at the same court, to file his declaration against the defendant; and if the defendant has not previously caused an appearance to be entered for him, he is then and there solemnly called in open court by the recorder, and afterwards by the crier of the court, *to appear to the plaint, and plead to the plaintiff's declaration;* and, in case of default, a day is given to appear and plead until the following court; and if the defendant does not appear and plead previous to such following court, he is again in like manner called at such following or third court, to appear and plead; and if the defendant should still make default, and neglect to appear, then at such third court judgment by default is given, according to such usage and custom, for the plaintiff against the defendant, for the amount of the debt, and for the costs and damages sustained by the plaintiff by reason of the defendant's detaining the debt; and afterwards an affidavit or verification on oath is made by or on behalf of the plaintiff of the amount of the debt justly and truly due from the defendant, and unsatisfied, to the plaintiff, and execution is thereupon awarded by the court, indorsed to levy for the amount of the debt so sworn to, and costs taxed by the recorder of the court.

Patteson, for the plaintiff in error. The certificate of the practice of the Court below is so framed as to support the record; therefore, if the custom set out in the certificate

1825.
Williams v. Lord Bagot.

is good in law, the plaintiff in error is concluded by it, and the judgment must, of course, be affirmed. But the custom is not good in law; first, because the process was erroneous; and secondly, because no custom can warrant a plaintiff in filing a declaration against a defendant who has not been brought into court. Upon the first point the dates in the case are decisive. The plaint was levied on the 7th of *September*, or on some day between that and the 21st of *September*, *as of* the 7th of *September*, 1823. The summons issued on the 18th, tested the same day, and returnable on the 21st. The attachment also issued on the 18th, tested the 7th, and returnable also on the 21st; and it appears by the return of the officer that they were both executed on one and the same day. The effect, therefore, of that, is precisely the same, as if the attachment had issued without any previous summons; which cannot be done in inferior courts. That is the general rule of law, and the reason of it is this: that the previous summons means a summons returnable before the attachment can issue, inasmuch as the ground of the attachment issuing, is, that the defendant has not obeyed the exigency of the summons. There are numerous authorities, all concurring upon this point: *Moravia* v. *Sloper* (*a*), *Marpole* v. *Basnett*, *Murphy* v. *Fitzgerald* (*b*), *Titley* v. *Foxall* (*c*) and Lord Chief Baron *Comyn* (*d*). That learned judge has laid down the rule in these words: "Process in the county court shall be by summons, attachment, and distress infinite, in all personal actions by plaint or justicies, except in trespass. In trespass, it shall be by attachment, and distress infinite (*e*)." [*Bayley*, J. The process may be irregular; but is there any case in which it has been held that such an irregularity may be assigned for error?] It seems to have been so admitted in *Moravia* v. *Sloper* (*a*), where *Willes*, C. J., citing a dictum of *Powell*, B., in *Guienne* v. *Poole* (*f*),

(*a*) Willes, 30. (*b*) Id. 38. in notis. (*c*) Id. 688.
(*d*) Com. Dig. *Court*. (P. 8.) (*e*) Id. *County*. (C. 9.)
(*f*) 2 Lutw. 935, and 1560.

1825.

WILLIAMS v. LORD BAGOT.

"that a capias in the first instance in inferior courts is only a process inverso ordine, and consequently erroneous and not void;" says in answer, "I cannot see the reason of this assertion; for by the same reason if in a superior court an exigent were to be taken out the first process, he might as well say that was only inverso ordine:" dissenting, therefore, from the position of *Powell*, B., not on the ground that such process would not be erroneous, but on the ground that it would be void. So, in *Pratt* v. *Dixon*, in error, (*a*), this court reversed the judgment of an inferior court, because it appeared upon the record that the defendant had been in the first instance *attached*, instead of *summoned*. The same point was also ruled in *Ward* v. *Ellayn* (*b*) and admitted as law in *Tuthil* v. *Milton* (*c*). Secondly, the declaration was filed too soon, for it was filed not only before the defendant had been brought into court, but even before he had been called. The plaintiff declared against the defendant at the same court at which the summons and attachment were returnable; that appears from the record, which states, first, that at the court holden on the 21st of *September*, the bailiff informed the court upon oath that he had served the summons and attachment; then, that "hereupon the said *William* Lord *Bagot* declares against the said *John Williams*;" and lastly, that "the said *John Williams*, though solemnly called, cometh not:" so that it is demonstrated that the plaintiff declared, both before the defendant had appeared, and before he was called. Now, there is no case in which the plaintiff has been held regular in declaring before the defendant has appeared, except, where, by the practice of superior courts, the declaration is filed or delivered de bene esse. The common law mode of proceeding was twofold: either by arrest, and then no declaration could be filed until the defendant appeared; or, by summons, attachment, and distress infinite, and then if the defendant neglected to appear his effects were sold under the distress. Even a custom for the plaintiff to appear for

(*a*) Cro. Jac. 108. (*b*) Id. 261. (*c*) Yelv. 158.

1825.

WILLIAMS v. LORD BAGOT.

the defendant can hardly be good where the goods have been seized under the attachment, for that is not allowed in the superior courts where bail has been put in and perfected. Besides the 12 *Geo.* 1. c. 29. (*a*) now extends to all inferior courts; and the plaintiff cannot enter an appearance for the defendant in any instance, unless the latter has been previously personally served with process. In this case, however, there was neither personal service of process upon the defendant, nor any entry of an appearance for him, and therefore in either point of view the proceedings were irregular and erroneous.

Chitty, contrà. The 12 *Geo.* 1. c. 29. does not apply to inferior courts. It could not have been intended to have such an application, for if it had, it would have annihilated the proceeding by foreign attachment in the mayor's court of *London*. But in that court a judgment may still be obtained against the garnishee, and the defendant in the original action is concluded by that judgment, although he has never been actually summoned. Inferior courts, therefore, are still free to proceed according to their own peculiar customs, and the principal question in this case is, whether the custom set out in the certificate is a reasonable and valid custom. What is there unreasonable in this custom? All that the defendant can claim is an opportunity to appear, and to answer the plaintiff's declaration, before judgment is signed against him; and he had that opportunity in the present case, because the process being served upon his wife in his dwelling-house, must be presumed to have reached his own hands, and therefore gave him notice of the proceedings as well as personal service could have done. There are rules of practice in the superior courts which savour more of hardship than the present; for instance, that which holds that bail are fixed by the suing out of a second writ of scire facias, though done without giving them notice: *Sillitoe* v.

(*a*) Amended by 5 *Geo.* 2. c. 27, made perpetual by 21 *Geo.* 2. c. 3, and extended to inferior courts by 19 *Geo.* 3. c. 70.

Wallace (*a*), and *Clark* v. *Bradshaw* (*b*). [*Littledale*, J. There is a variance between the certificate of the practice and the record. The former states that after the declaration is filed, the defendant is called *to appear to the plaint, and to plead to the declaration;* the record states only that the defendant was *called:* the mere act of calling him would not give the defendant notice that a declaration had been filed, but the calling him *to appear and plead* would do so.] But, even if the objection to the process is well founded, it is still a mere irregularity, and cannot be taken advantage of by a writ of error. Such an irregularity is cured by the statutes of jeofails. *Bishop* v. *Kaye* (*c*), *Pitt* v. *Knight* (*d*), *Hale* v. *Clare* (*e*), *Hayes* v. *Warren* (*f*), *Stennel* v. *Hogg* (*g*), and Com. Dig. *County*. (C. 13.) This record would have been sufficient, if it had been set forth with a taliter processum est. [*Holroyd*, J. That might be good in pleading a justification; but this is a very different case.]

Patteson, in reply, was stopped by the Court.

BAYLEY, J.—I am quite satisfied that the custom set out in the certificate is bad in law. This was an action in a court of record; a final judgment obtained there is conclusive against all parties: and it is contrary to all principles, both of law and justice, that a party should be concluded unheard. In the ordinary action of debt the process is, first a summons, and upon the return of that, a distringas; generally speaking there is no attachment in an action of debt. Here there was a summons, as in an action of debt, and, concurrent with that, an attachment, as in an action of trespass; and we are informed that such process is consistent with the custom of the court. I am inclined to think that the custom might render such a mode of proceeding valid, or, at least, that such an apparent irregularity would

(*a*) Tidd, 1144. MS. (*b*) 1 East, 89. (*c*) 3 B. & A. 605.
(*d*) 1 Saund. 86. in notis. (*e*) 1 Salk. 266. (*f*) 2 Str. 933.
(*g*) 1 Saund. 227.

1825.

WILLIAMS v. LORD BAGOT.

not lay the foundation for a writ of error. It is, however, unnecessary to decide that question, because I am decidedly of opinion that the plaintiff's declaring in the absence of the defendant, and signing final judgment against him before he had even appeared to the suit, is a fatal objection to the proceedings. It is said this is a reasonable custom. Let us try its reasonableness by the dates and the facts of this case; for our present purpose it is not requisite to go farther. The process issued on the 18th, returnable on the 21st of *September*. It was not served personally on the defendant, but it was served on his wife, in his dwelling-house, within the jurisdiction of the court; and it is not alleged as part of the custom that process so served must be shewn to have reached the hands of the defendant. At the next court, which was held on the 21st, the same day that the process was returnable, the defendant was called. He did not appear. At the next court, which was held fourteen days afterwards, final judgment was awarded against him; so that there was an interval of only seventeen days between the issuing of the process and final judgment. This seems to me a most unreasonable mode of proceeding, for by this judgment, if it is good, the defendant must be concluded, though non constat that in the whole seventeen days he received any notice that an action was pending against him. There is no analogy in the law to support such a custom as this, and it is in direct violation of that maxim both of law and equity, audi alteram partem. In all the forms of practice in the superior courts we find an allegation that the party appears, and in all personal actions his actual appearance is recorded. If he does not in fact appear, the plaintiff in personal actions proceeds by summons and distress infinite, or, in cases where a capias lies, by capias utlagatum. In certain cases the 12 *Geo.* 1. c. 29. supersedes the necessity of an actual appearance by the defendant, and empowers the plaintiff to enter an appearance for him; but there a personal service of the process upon him is indispensable. That statute is now undoubtedly extended to inferior courts, but as

the defendant in this case was not personally served with the process, the plaintiff cannot avail himself of it. I am, therefore, of opinion, that this is an unreasonable custom, bad in law, and not to be supported; and that the judgment of the court below must consequently be reversed: I am also of opinion that there is a variance between the certificate and the record, as pointed out by my brother *Littledale*.

HOLROYD, J.—I am also of opinion that the certificate and the record are at variance, and that the custom certified is not valid in point of law. In a personal action the plaintiff must make it appear that he has brought the defendant personally into court, before he can obtain final judgment against him. In a real action the first process is the petit cape, under which the profits of the lands sought to be recovered are seized, and if the defendant neglects to appear to that, the grand cape issues, under which the land itself is seized; but these do not affect the defendant's person. In the superior courts, the first process in actions of debt or covenant, is the summons; in actions of trespass, the attachment issues in the first instance, because it is assumed that a tort has been committed. The defendant is then attached by his goods, and if he makes default in appearing, the plaint cannot be heard, and the plaintiff must proceed by distress infinite; and even where the defendant is attached by his person, it is the business of the sheriff to bring him into court if possible, and if that is impossible, the plaintiff must resort to process of outlawry. This is the course of proceeding in the highest courts in the kingdom; the right contended for here, of declaring behind the back of the defendant, is not known in any of them: which is, I think, conclusive to shew that such a right cannot be supported upon any legal principle, and that a custom so to declare is illegal and void.

LITTLEDALE, J.—I am entirely of the same opinion.

1825.

Williams v. Lord Bagot.

The judgment of the court below seems to me clearly erroneous on both points. In the first place, I think the issuing the summons and the attachment on one and the same day, was matter of error. A summons would have been the first step in a similar action in this Court, and I do not understand how a custom to the contrary can legally exist in an inferior court. This is not a mere irregularity, which might have been corrected upon application to the court below, because the certificate states it to be sanctioned by the custom of that court; the defendant's only remedy, therefore, was a writ of error to the court above. In the second place, I think the plaintiff's declaring before the defendant had appeared, was also clearly matter of error. It is an universal rule in all superior courts, that there must be an appearance before declaration; and though where the defendant fails to appear, the plaintiff may in different cases resort to different process, as in some to distress infinite, in others to outlawry, and in the exchequer to commission of rebellion; still in none of these can he file his declaration. The 12 *Geo.* 1. c. 29. certainly enables the plaintiff to enter an appearance for the defendant; but there that very entry shews that the defendant has appeared, and the entry itself cannot be made until the defendant has been personally served with the first process. Here there was no personal service; therefore the statute does not apply. Lastly, I think this record would not have been good, if set out with a taliter processum fuit; that may do, where the proceedings of the inferior court come in collaterally; but it will not do here, where we are examining the record itself.

Judgment reversed.

1825.

HODGSON *v.* JAMES ANDERSON.

ASSUMPSIT for 443*l.* 17*s.* 11*d.* the balance of accounts between plaintiff and defendant, with interest thereon from 1st of *October*, 1819. Defendant paid 300*l.* into Court, and pleaded non-assumpsit, with notice of set-off. The particulars stated that the set-off was upon 208*l.* 5*s.* 10*d.* paid the 11th of *April*, 1822, by defendant's agent to the commercial banking company of *Scotland*, at the request and upon the written order of plaintiff, and in pursuance of an undertaking and liability to pay the same to the said company for plaintiff, according to the said request and order, made and entered into long before the time of the payment. At the trial before *Abbott*, C. J. at the *London* adjourned sittings after *Hilary* term, 1823, the plaintiff had a verdict for 209*l.* 15*s.*, but a rule nisi for a new trial having been obtained in the following term, the Court then directed the facts to be stated in a special case, which was as follows.

A. is indebted to *B.*; and *C.* who resides abroad, is indebted to *A.* *A.* proposes to assign to *B.* the debt owing from *C.* to him, which *B.* agrees to accept. *A.* writes to *C.*'s agents in this country, "as soon as you have funds belonging to *C.* pay on my account to *B.* 291*l.* 19*s.* and I will credit *C.* *having received his order to this effect.*" *C.*'s agents *verbally* promise *B.* to pay him as they have funds of *C.* in hand. *A.* afterwards orders *C.* to pay to another creditor the debt owing from *C.* to *A.*, and *C.* gives an undertaking to pay that creditor, with a memorandum, stating, that as it was alleged that a payment had been made by some person to *A.* on account of *C.*, it was declared that should *C.* prove such payment to have been made, the amount should be deducted. *C.* having refused to pay the debt to this latter creditor, on the ground that his agents were liable to pay it to *B.*, and *C.*'s agents having in fact afterwards paid it to *B.*—Held, 1. That a creditor may insist on payment either to himself or his agent; but, having once authorized payment to his agent, he cannot revoke that authority, if the debtor has given such a pledge to pay pursuant to the authority, as binds him in law to do so. 2. That *A.*'s declaration, "I will credit *C.* having received his order to this effect," was, as against *A.*, evidence that he had previously received such order, and, consequently, that *C.* had expressly consented that his debt to *A.* should be paid to *B.* 3. That, if not, still *C.*'s consent to that arrangement might be inferred, because in his undertaking to pay to the other creditor, *C.* stipulated, that any payment made by any person to *A.* on account of his (*C.*'s) debt, should be deducted. 4. That *C.*'s promise to pay *B.* was not a promise to pay the debt of a third person, and therefore was not within the statute of frauds.

The defendant resided for many years in *Trinidad*, until *August*, 1821. Prior to the year 1816, he became indebted to the plaintiff in a larger amount than the sum set off by him in this action. The plaintiff was a shareholder in the commercial banking company of *Scotland*, and that com-

1825.
HODGSON v. ANDERSON.

pany discounted bills for him. Early in 1816 the company discounted for the plaintiff a bill drawn by him for 270*l.* and accepted by one *Dickson.* On the 19th of *March*, 1816, the plaintiff was informed by the secretary to the company that the bill had been dishonoured. On the 22d of the same month the plaintiff wrote to the secretary in answer, that both he and *Dickson* required time to meet their engagements, that they could not retire the bill, and that he, the plaintiff, had mentioned his situation to Mr. *Robert Anderson*, of *Edinburgh*, the defendant's brother, and a director of the company, and added, "I also mentioned to my friend, Mr. *Robert Anderson*, that as his brother in *Trinidad* was indebted to me nearly 400*l.* I would, if he pleased, give him a receipt for the returned bill with charges on his brother's account, which would secure the payment, as that gentleman had considerable property in *Edinburgh*; and as he a few months back referred me to Mr. *Anderson* and Mr. *Rhind*, his attornies, for a settlement of my demand, I trust the company will be induced to accede to our proposal, or that Mr. *Anderson* will take the bill as a payment from his brother to me." To this proposal Mr. *Anderson* did not accede, and by a letter of the 4th of *November*, 1816, the secretary again pressed the plaintiff for payment of the bill, who, on the 8th of the same month, returned the following answer. "I propose to grant you my promissory note, at seven months from this date, including interest and charges, you holding Mr. *Dickson's* acceptance till this is paid, and my commercial bank share receipt also, as a collateral security, which I will send you as soon as I have your permission, and know the amount of charges. I had flattered myself, my very old friend, *Robert Anderson*, one of your company, would have assumed the amount of Mr. *Dickson's* acceptance, on account of a debt nearly 150*l.* more than this bill, due to me by his brother; but this I fear is not agreeable; but if the company wish, I will make an assignment of this debt to them in addition, should it be required."

On the 19th of *November*, 1816, the secretary wrote to the plaintiff as follows. "I am directed to acquaint you that the proposal made in your letter of the 8th instant is acceded to; you will please, therefore, immediately hand in your promissory note at seven months, dated the 8th instant, for 291*l.* 19*s.* being the amount of the former bill, interest, and expenses, as noted on the other side. As your share of stock is assigned to us by the contract of co-partnery, in security of debts, you need not send us the receipt. Mr. *Anderson* says the debt you mention as due by his brother is as you state, but there is no money of his forthcoming at present to meet it, and that he shall, if necessary, pay to us, when he has funds, on your order: you will please, therefore, hand us a letter addressed to Mr. *Anderson* and Mr. *Rhind*, desiring them to pay us the sum due as soon as they are in funds." On the 23d of *November*, 1816, the plaintiff wrote to the secretary, and inclosed in the letter his own promissory note for 291*l.* 19*s.* at seven months, and the following note addressed to *Anderson* and *Rhind*. "As soon as you have funds belonging to *James Anderson* of *Trinidad*, I will thank you to pay, on my account, to the commercial banking company in your city, 291*l.* 19*s.* being the amount of my promissory note in favour of *E. Robertson*, Esq. or any part of the same, advising me the amount, and I will credit Mr. *J. Anderson, having received his order to this effect*, as he is indebted to me more than this order." This note was delivered to Messrs. *Anderson* and *Rhind*, and they *verbally* promised the banking company to pay them according to the terms of the order, as they should have funds of the defendant in hand; and this promise was never retracted. On the 29th of *January*, 1820, the plaintiff wrote a letter to Mr. *A. Hill*, of *Trinidad*, inclosing an abstract of his account with the defendant, balanced to the 1st of *October*, 1819; the amount of this balance was 443*l.* 17*s.* 1*d.* In this letter was also inclosed a power of attorney to enable *Hill* to recover the same; and he then informed *Hill*, that as *Loughnan* and Co. had a considerable demand against

1825.
HODGSON v. ANDERSON.

him, he had agreed that *Hill* should remit *Loughnan* and Co. the amount he should recover from that debt, and the plaintiff accordingly begged that *Hill* would comply therewith, and remit *Loughnan* and Co. whatever sums he might recover. The plaintiff executed no other assignment to *Loughnan* and Co. of the debt owing by the defendant than this letter. On the same day *Loughnan* and Co. wrote to one *Lockhart*, requesting him to direct *Hill* to recover the amount from Dr. *Anderson*, the defendant. *Hill* applied to the defendant in *Trinidad*, and he and his son entered into the following obligation. "*Trinidad*, 11th of *June*, 1821. We do hereby promise to pay, or cause to be paid, unto *H. S. Hill*, or to his order, as attorney of *A. Loughnan* and Co. *London*, being a debt assigned to them by *John Hodgson*, of *London*, and due by the undersigned *James Anderson*, the sum of 488*l.* 6*s.* 3*d.* sterling, with interest on the sum of 443*l.* 17*s.* 11*d.* sterling, from this date, on or before the first day of *March*, 1822; and for assuring the due payment thereof, we bind ourselves and each of us, our heirs, executors and assigns, each in solidum unto the said *H. S. Hill*, or his order, to and for the use of the said *A. Loughnan* and Co. And whereas it hath been alleged, that a payment of 300*l.* has been made on account of this debt by some person to *John Hodgson* on account of *James Anderson*; it is, therefore, hereby declared, that should such payment be proved by the said *James Anderson* to have been made to the said *John Hodgson* by some person on account of the said *James Anderson*, on or before the first day of *March*, 1822, that then the said 300*l.* and interest thereon shall be deducted." On the 15th of *June* the secretary to the company wrote to the plaintiff, and informed him that the promissory note which was due on the 6th instant had been returned under protest from *London*, and that the company declined renewing it without some additional security. The plaintiff replied that he could not procure such security, nor pay the note, and directed his share in the bank to be sold for the benefit of the company. According to these instructions

the plaintiff's share in the bank was sold, and purchased by the company at the price of 140*l.* The company also received the dividends due to the plaintiff in respect of his share, and thus the debt due from the plaintiff to the company, which had increased to 346*l.* 19*s.* 1*d.* was reduced to 193*l.* 1*s.* 9*d.* On the 10th of *May*, 1821, the secretary, by letter to the plaintiff, acknowledged the receipt of Mr. *G. Rolfe's* acceptance for 196*l.* 7*s.* 6*d.* The defendant arrived in *Edinburgh*, in *August*, 1821, and *Loughnan* and Co. then wrote to him, demanding payment of the debt due from him to the plaintiff, which had been assigned to them as above mentioned, which produced the following letter from the defendant to *Loughnan* and Co. dated the 24th of *August*, 1821. "I had the honour of receiving yours of the 17th instant, and have made the necessary inquiries into the business alluded to in your letter, The case is this. The commercial bank of *Edinbargh* hold a bill of Mr. *John Hodgson's* for 196*l.* sterling, on Mr. *G. Rolfe's* acceptance, due in *November* next, which my brother and father-in-law, (*Anderson* and *Rhind*,) as my attornies, are security for to the bank for the above sum, on account of the debt I owe Mr. *John Hodgson.* If Mr. *Hodgson*, as I suppose he will, pays the bill when due in *November*, I shall then, of course, owe you the full amount of my account transferred by Mr. *Hodgson* to your house. If, however, the commercial bank come upon me for it, it will then, of course, be deducted from the amount due to Mr. *Hodgson* by me, and transferred to you by him." The bill drawn upon and accepted by *Rolfe* was not paid when due. On the 27th of *March*, 1822, the defendant wrote to *Loughnan* and Co. stating that 203*l.* 1*s.* 7*d.* was due from the plaintiff to the bank, and that he, the defendant, must pay that sum to the bank. On the 30th of the same month, *Loughnan* and Co. wrote to the defendant, giving him notice not to pay to the banking company the debt due from him to the plaintiff. On the 11th of *April* following, the defendant's agent paid the debt due to the banking company, under an indemnity from them; no

engagement was entered into by the defendant's agent with the company beyond the *verbal* assurance given by them on the plaintiff's order being communicated to them.

Kaye, for the plaintiff. The defendant insists that the plaintiff's order upon his agents to pay money to the banking company, was an authority coupled with an interest, and therefore not revocable. Whether it was revocable or not, is the first question in the case; and how do the facts stand? The defendant, being indebted to the plaintiff, and the plaintiff to the banking company, the plaintiff orders his agents, *Anderson* and *Rhind*, whenever they shall receive money to his use, to pay it in liquidation of his debt to the banking company, and he gives the banking company notice of that order. That was not an absolute order to pay money, for it depended on a contingency. His language is, "as soon as you have funds, I will thank you to pay." That is precisely the same thing as if a merchant said to his clerk, "as soon as my debtor pays me, do you pay my creditor with the money you receive from my debtor." That would be, and so is this also, a mere naked authority, always revocable until executed, or, at least, revocable until the funds are by some subsequent act specifically appropriated to the use of the creditor. This view of the case, however, applies only to the plaintiff, to his agents *Anderson* and *Rhind*, and to the banking company. The defendant upon this record is Dr. *Anderson*, who was no party to this transaction. The whole defence set up to this action is founded on this fallacy, namely, the treating *Anderson* and *Rhind* as the agents of the defendant instead of the agents of the plaintiff. But they had nothing to do with the defendant; they received neither instructions nor authority from him upon the matter: he was resident abroad, and was wholly ignorant of the arrangement until he returned to *Scotland* in 1821. If *Anderson* and *Rhind* had received from the defendant funds to the use of the plaintiff, it might perhaps be contended that the plaintiff could not then have revoked his order. But

that question does not arise; the real question here is, whether the defendant was compelled to place funds in the hands of *Anderson* and *Rhind*, and if not, whether, having done so wilfully, and after notice not to pay the money to them, he is not liable in this action. How is the defendant affected by the order, or upon what principle can he set it up as an answer to this action? He was no party to the negociations between the plaintiff, the banking company, and *Anderson* and *Rhind*; he did not even know of them till 1820, when he consented that his debt to the plaintiff should be assigned to *Loughnan* and Co.; and the order, which bore date *November*, 1816, he did not even then know to be in existence, for if he had, he would never have consented to that assignment. In what manner did the plaintiff authorize the defendant to pay the banking company? The banking company could never have sued the defendant upon the strength of the order, nor his agents *Anderson* and *Rhind*, even though one of the latter had not been a partner in the bank. This is not like the case put by *Buller*, J. in *Tatlock* v. *Harris* (a); "Suppose *A.* owes *B.* 100*l.*, and *B.* owes *C.* 100*l.*, and the three meet, and it is agreed between them that *A.* shall pay *C.* the 100*l.*; *B.'s* debt is extinguished, and *C.* may recover that sum against *A.*" In that case there would be an absolute assignment of the debt, made with the knowledge and consent of the debtor: here there is neither an absolute assignment nor the assent of the debtor. In this respect the present case differs also from *Israel* v. *Douglas* (b) and the other cases of that class. This is an assignment of a chose in action, and the defendant having consented that his debt to the plaintiff should be assigned to *Loughnan* and Co., notice from them to the defendant not to pay the money to *Anderson* and *Rhind*, was the same as notice to that effect from the plaintiff. When the plaintiff says in the order, "I will credit Mr. *J. Anderson*, having received his order to this effect," he does not mean that he had actually been ordered by the defendant

(a) 3 T. R. 180.

(b) 1 H. Bl. 239.

1825.

HODGSON v. ANDERSON.

at *Trinidad* to pay his, the plaintiff's, own debt to the banking company; he means merely that he had been referred by his debtor to *Anderson* and *Rhind*, as his attornies in *Edinburgh*, and as the persons from whom he should demand payment of his debt; and that the plaintiff had received such a reference, is plain from his letter to the secretary of the 22d *March*, 1816.

Cameron, contrà. The language of the plaintiff justifies the presumption, as against himself, that the defendant was a party to the assignment; and then, it is an assignment of a chose in action with the consent of all the parties concerned, and consequently valid and binding on them all. In his letter of the 23d *November*, 1816, the plaintiff, after directing *Anderson* and *Rhind* to pay the banking company as soon as they are in funds, says, "I will credit Mr. *J. Anderson* (the defendant), having received his order to this effect." This was a representation that the defendant was a party to the assignment; it was made voluntarily, and in the course of a correspondence in which the plaintiff was endeavouring to obtain a favour; and having once made it, particularly under such circumstances, he cannot now retract or qualify it. But whether the defendant was a party to the assignment or not, it is still binding on the plaintiff as between him and the defendant, for it is irrevocable by the plaintiff as the assignor. The rule of law which says a chose in action is not assignable, means only that a debtor's liability shall not be transferred from one creditor to another, without his own consent; but neither that, nor any other rule of law, prevents a man from making such an assignment of a debt, as shall be irrevocable by himself. A court of law cannot, indeed, except in the exercise of its equitable jurisdiction, take notice that the parties on the record are not the real parties in the action; but when such an assignment comes fairly before the Court, either on the pleadings or in evidence, as affecting the interests of the parties on the record, the Court will take

notice of it, for the purpose of doing justice between them: *Mouldsdale* v. *Birchall* (*a*). Then, if in point of law the plaintiff might make an irrevocable assignment, it is perfectly clear that in point of fact he intended to do so. He treats it as an assignment in all his letters, and he tenders it to the banking company as part of the consideration for allowing him time upon his bills. He, therefore, intended the banking company to consider it as an absolute and irrevocable assignment, for else it would have been utterly useless to them; because a consideration, dependent on a contingency which is in the power of the party from whom the consideration moves, is worth nothing; and this was such a consideration, if the plaintiff was to reserve to himself the power of revoking it, and then he has practised a gross fraud upon the banking company. But this order was an authority coupled with an interest, and as such it was not revocable; *Walsh* v. *Whitcomb* (*b*), *Watson* v. *King* (*c*), *Drinkwater* v. *Goodwin* (*d*), and *Fisher* v. *Miller* (*e*); and the distinction taken in the latter case between an appropriation of money and a mere order to pay, and upon which the decision of the court of *C. P.* there turned, is strongly applicable to the present case. But, lastly, there has not, in point of fact, been any revocation of this order; at least, no notice of it was ever given to the defendant; he, therefore, was not only justified in making the payment, but the banking company might have maintained an action of special assumpsit against him, if he had refused to do so. The assignment was absolute and complete from the first, with reference to all the parties concerned in it; namely, the plaintiff, who made it; the banking company, who accepted it; *Anderson* and *Rhind*, who promised to pay when they received funds of the defendant; and the defendant, who, according to the plaintiff's own representation, authorized the whole arrangement. The statute of frauds cannot be said to bear at all upon the case; because the promise made by the defendant

(*a*) 2 Sir W. Bl. 820. (*b*) 2 Esp. N. P. C. 565. (*c*) 4 Camp. 272.
(*d*) Cowp. 251. (*e*) 1 Bing. 150. 8 J. B. Moore, S. C.

1825. HODGSON v. ANDERSON.

was, not to pay with his own money the debt of a third person, but to pay with his own money his own debt.

The case was argued on a former day during these sittings, when the Court took time to consider of their judgment, which was now delivered by

BAYLEY, J. who, after stating the nature of the action, and the pleadings, thus proceeded. Upon due consideration of this case, we have found no difficulty in it. The only question is, whether a payment by a debtor to a third person, in pursuance of an order to that effect from the creditor, was good in law, so as to operate as a payment of the debt to the creditor, and a discharge of it to the debtor. The short facts of the case were these. In *March*, 1816, the plaintiff and one *Dickson* were indebted to the Commercial Banking Company of *Scotland*, upon a bill of exchange drawn by the plaintiff upon and accepted by *Dickson*. The bill being over due, the plaintiff proposed to the banking company, that a larger debt, owing to him from the defendant, a brother of one of the directors of the company, should be accepted by the banking company, and that the debt owing to the plaintiff from the defendant, should, pro tanto, be liquidated. To this proposal the banking company did not at that time accede, but in *November* following the plaintiff renewed it, with the addition of offering to make a regular assignment of the debt to the banking company. To this proposal they were disposed to accede, as appears by their letter of the 19th *November*, and on the 23d *November* the plaintiff handed to the banking company an order upon *Anderson* and *Rhind*, the defendant's agents, directing them, as soon as they should have funds belonging to the defendant, to pay, on account of the plaintiff, to the banking company, 291*l*. 19*s*. or any part thereof; adding, "I will credit Mr. *J. Anderson* (the defendant), having received his order to this effect." That was a distinct authority from the plaintiff to *Anderson* and *Rhind*, to apply the

debt, owing to him from the defendant, in liquidation of his own debt of 291*l.* 19*s.* That order was communicated to *Anderson* and *Rhind*, the defendant's agents, and they verbally promised the banking company to pay them according to the terms of the order, which promise they never retracted. Now, there is no doubt that a creditor has a right to insist upon payment either to himself or his agent; whether, having ordered payment to his agent, he can afterwards revoke that order, it is not necessary to decide, because I am of opinion that a creditor is not at liberty to revoke an authority once given, if there is also such a pledge given by the debtor to pay according to the authority, as imposes upon him a legal obligation so to pay. Then the question is, whether such a pledge was given by the defendant's agents in this case, and whether there was a legal obligation on them to pay over the money to the banking company, as soon as it came into their hands. The agents of the defendant did give a verbal promise to pay, but that, it may be argued, could not bind the defendant. It has been insisted, on behalf of the defendant, that the plaintiff's expression, in his letter of the 23d *November*, to *Anderson* and *Rhind*, "I will credit Mr. *J. Anderson*, having received his order to this effect," implied that the defendant was an assenting party to the order. On behalf of the plaintiff it has been urged, that it was no more than a conditional or contingent order, a mere direction to pay if he should receive an order. I think the fair import of it is, that the plaintiff had at that time actually received an order from the defendant. Both the nature of the transaction and the grammatical construction of the words, seem to me to justify this construction, for ample time had elapsed since the original proposal, for such an order to have reached him, and the words certainly imply an act done, not one in expectancy. If the plaintiff had not received the defendant's order, his own order was no security at all; and if the banking company had not understood that the defendant's order had been given, they would have required his assent to the

1825.
Hodgson v. Anderson.

plaintiff's order, and also a regular assignment of the debt. It seems to me that there was evidence of an express assent on the part of the defendant, such as made him liable to the banking company; but if not, still I think there are circumstances in the case from which his assent may be fairly implied. It appears, from the correspondence, that in *January*, 1821, the plaintiff wrote to a Mr. *Hill*, authorizing him to receive the money from the defendant, and remit it to *Loughnan* and Co., and that in *June*, 1821, the defendant gave to Mr. *Hill* an undertaking to pay the money by the 1st of *March*, 1822. There was, however, an important reserve, or qualification, in that undertaking, which applied to the whole of the transaction, both to the security given by the plaintiff, and to the assent thereto of the defendant. That was, a memorandum, that as it had been alleged that a payment of 300*l*. had been made on account of this debt by some person to the plaintiff on account of the defendant, it was declared that should such payment be proved by the defendant to have been made to the plaintiff by some person on account of the defendant, on or before the said 1st of *March*, 1822, then the said sum of 300*l*. should be deducted. Now, that could apply only to the transaction in question, and then the inference necessarily arises that the defendant had consented that that part of the debt owing from him to the plaintiff should be applied in payment of the debt owing from the plaintiff to the banking company; and if the defendant did so consent, he became legally bound to make that payment. Then the case put by *Buller*, J. in *Tatlock* v. *Harris* applies to this case. He says, "If *A*. owes *B*. 100*l*., and *B*. owes *C*. 100*l*., and the three meet, and it is agreed between them that *A*. shall pay *C*. the 100*l*.; *B*.'s debt is extinguished, and *C*. may recover that sum against *A*." So here, on payment by the defendant to the banking company, the plaintiff's debt to them would be discharged pro tanto. I think the case is not within the statute of frauds, because it was a promise by the defendant to pay his own debt with his own money, only paying it to the

banking company instead of to the plaintiff; it was not a promise to pay with his own money the debt of the plaintiff, a third person. A written promise, therefore, was not necessary, in order to impose upon the defendant an obligation to pay the banking company, because there was no agreement to pay money which the party by law was not obliged to pay; there was a full and adequate consideration for the payment. The debt was a subsisting debt; it was the debt of the defendant: the only question was, to whom it should be paid. There was also a valid consideration moving from the banking company, namely, their forbearing to sue the plaintiff. We are, therefore, of opinion that the defendant did assent to the order; that having assented to it, he was legally bound to pay the money according to the terms of it; and that such payment was a discharge of the debt, notwithstanding the subsequent order in favour of *Loughnan* and Co. Nor are they in any degree damnified. There was a qualification in the undertaking to pay them; they knew the effect of that qualification; it informed them of the obligation to pay the banking company; therefore they were apprised, and in due time, of their own situation. The defendant's payment to the banking company was a good payment by him, and binding upon the plaintiff; and, therefore, the rule for a new trial must be made absolute.

1825.

HODGSON v. ANDERSON.

Rule absolute.

J. SCHLENCKER and another *v.* W. MOXSY, survivor of J. MOXSY, deceased.

If a tenant underlets part of the premises *by deed*, and the original lessor distrains upon the under-tenant for rent, the latter cannot maintain assumpsit against *his* lessor, to recover the money paid under the distress.

ASSUMPSIT. The declaration stated that defendant and one *J. Moxsy*, in his life time, held a certain messuage and premises, situate &c. as tenants thereof to one *C. Whitmore*, for a term of years, part of which was unexpired, at the

1825.

SCHLENCKER v. MOXSY.

yearly rent of 40*l.*; that they, so holding the said premises, did, on the 24th *October*, 1815, by indenture demise part of the said premises to the plaintiffs, for the residue of the said term, at the yearly rent of 30*l.*; and that in consideration of the premises defendant undertook and promised plaintiffs to indemnify and save them harmless from and against the said yearly rent, payable by him to the said *C. Whitmore*. Breach, that defendant did not indemnify or save them harmless, but on the contrary they were obliged to pay and did pay to the said *C. Whitmore* two years' ground rent, for the years ending *Lady-day*, 1822 and 1823. Plea, the general issue, and issue thereon. At the trial before *Abbott*, C. J., at the *London* adjourned sittings after last *Hilary* term, the plaintiffs obtained a verdict, damages 34*l.* 12*s.* 7*d.*, subject to the opinion of the Court upon the following case:

On the 23d *September*, 1806, *C. Whitmore* demised the premises mentioned in the declaration to one *W. Nooght*, for the term of twenty years from the preceding *Midsummer*, upon the usual covenants, at the yearly rent of 40*l.* In 1815, one *W. Hepburn*, then assignee of that term, assigned his interest in the premises to the defendant and *J. Moxsy*, deceased. While they were in possession, namely, on the 24th *October*, 1815, they granted an under-lease of part of the premises to the plaintiffs, for the term of nine years from the preceding *Michaelmas*, at the yearly rent of 30*l.*, free from all parochial and parliamentary taxes, with covenant for the payment of the rent, for quiet enjoyment, and other usual covenants; but the lease did not contain a covenant that the lessors would indemnify the lessees from the claim of *C. Whitmore*, the ground landlord. The plaintiffs regularly paid their rent to their lessors up to *Midsummer*, 1821. The two following quarters, namely, *Michaelmas* and *Christmas*, they paid to one *Wade*, to whom they understood the defendant and *J. Moxsy* had assigned all their interest in the lease which they held under *C. Whitmore*. After the last payment, *Wade*, who lived in the other part of the in part demised messuage, left the same, and could not be

found. On the following quarter day, namely, *Lady-day*, 1822, the agent of *C. Whitmore* claimed 40*l*., one year's ground rent, and 1*l*. 0*s*. 2*d*. redeemed land tax, which the plaintiffs, under threat of distress, were compelled to pay. In *March*, 1823, another year's ground rent became due, for which *C. Whitmore* actually distrained on the plaintiffs, together with another year's redeemed land tax: this the plaintiffs were also obliged to pay, making the sum, including the expenses of the distress, 83*l*. 5*s*. 4*d*., leaving upon a balance 34*l*. 12*s*. 7*d*. claimed to be due from the defendant to the plaintiffs, after deducting the 30*l*. yearly rent due from the plaintiffs to the defendant, and some other trifling items, being the sum taken by the verdict. The defendant paid the rent and taxes up to *Midsummer*, 1821. One *J. Watson*, being called as a witness on the part of the defendant, and required, under a subpœna duces tecum for that purpose, to produce an assignment of the said term, alleged to have been executed by the defendant, after the death of *J. Moxsy*, to *Wade*, in *July*, 1821, declined to produce it, unless he was ordered so to do by the Lord Chief Justice; and he demurred, on the ground that it was deposited with him by *Wade* as a collateral security, and the production of it might be injurious to his interest. The Lord Chief Justice ruled that *Watson* was not bound to produce the assignment. *Wade* had never paid rent to *C. Whitmore*, but he was in possession of the original lease from *C. Whitmore* to *Nooght*, which was produced by him at the trial, and duly proved by the subscribing witness.

The questions for the opinion of the Court are,

First, whether the Lord Chief Justice should have directed the witness to produce the assignment from *Moxsy* to *Wade*.

Second, if the Court should be of opinion that the witness ought not to have been required to produce the assignment, whether, under the above circumstances, the plaintiffs are entitled to recover.

Third, if the court should think that the witness ought to

1825.

SCHLENCKER v. MOXSY.

have been directed to produce the assignment, the assignment to be considered in evidence, whether, in that case, the plaintiffs are entitled to recover.

Curwood, for the plaintiffs. The plaintiffs were equally entitled to recover, whether the assignment is considered in evidence, or not, therefore, it is unnecessary to argue the question whether the Lord Chief Justice ought, or ought not, to have compelled its production. The defendant contends that as the mere assignee of a lease, his interest in which he has re-assigned, he is not responsible to the lessor for any breach of covenant committed prior to the time when his interest began. But this is not precisely that case. The defendant was the original lessor of part of the premises to the plaintiffs, and could not relieve himself from the responsibility thereby attaching to him, by assigning his lease of the whole of the premises. In equity the defendant undertook to indemnify the plaintiffs from the claim of the ground landlord, though the lease contained no express covenant to that effect. Therefore if the assignment is considered in evidence, the defendant is liable upon an implied assumpsit to indemnify the plaintiffs against every thing but the rent of 30*l.*; and if the assignment is not considered in evidence, he is also liable, because then it does not appear that he is a mere assignee.

Campbell, contrà, was stopped by the Court.

BAYLEY, J.—How is it possible that the plaintiffs can maintain an action of assumpsit against the defendant, under the circumstances set forth in this case? We cannot raise an implied contract, where we find that the parties have entered into an express contract by deed. Upon that ground it is clear that this action is not maintainable, and that a nonsuit must be entered; therefore it is quite unnecessary to consider the first and second queries proposed to us by the case.

1825.

SCHLENCKER v. MOXSY.

HOLROYD, J.—It is quite clear that where parties have made an express contract by deed, every implied contract is excluded. These parties have done so, therefore assumpsit will not lie. If the plaintiffs had been disturbed in the quiet enjoyment of the premises, they might have maintained covenant on the demise; Com. Dig. *Covenant*, (A. 4.) but, having entered into an express contract by deed, they cannot maintain assumpsit, *Toussaint* v. *Martinnant* (a).

Judgment of nonsuit.

(a) 2 T. R. 100.

NOCKELLS *v.* CROSBY, MITCHELL and another.

If the projectors of a scheme, to be carried on by subscriptions, induce a number of persons to subscribe their money in the purchase of shares, and the scheme is abandoned before it comes into operation:—Held, that the subscribers are entitled to maintain money had and received against the projectors for the whole money subscribed, free from any deduction for expenses incurred in the formation of the plan.

A scheme for raising money by small subscriptions, which are to be laid out at interest, and inure for the benefit of the subscribers by survivorship, the subscribers to be governed by rules and regulations to be made by the directors, and at the end of a year transferable shares are to be issued, is not within the prohibitions of 6 *G*. 1. c. 18. ss. 17 & 18.

THIS was an action of assumpsit for money had and received by the defendants to the plaintiff's use, and for money due upon an account stated. Plea, non-assumpsit, and issue thereon. The defendants paid 252*l*. 11*s*. into Court. At the trial before *Abbott*, C. J. at the *London* adjourned sittings after last *Hilary* term, the jury, under the learned judge's directions, found a verdict for the plaintiff for 47*l*. 15*s*. subject to the opinion of the Court on the following case:—

The defendants were directors of a scheme called "*The British Metropolitan Tontine.*" By their authority a printed paper was circulated, stating, amongst other things, that to effect the objects of the scheme, it was proposed to receive subscriptions of ten shillings per week from each member for the period of one year, namely, from the 1st of *January*,

1825.

NOCKELLS v. CROSBY.

1821, to the 1st of *January*, 1822, and that the total amount of such year's subscription should be deemed a share, and all such shares form one capital, or joint stock, of the company, with benefit of survivorship; that the amount of the subscriptions would be vested in the names of the trustees, and from time to time laid out in government or other securities, the net proceeds and interest of which would be equally divided among all surviving shareholders twice in every year; that members were to subscribe their names to the company's rules and regulations at the time of opening their subscriptions, or at any subsequent convenient time, and to abide thereby; that the management of the company was vested in eight directors; and that at the expiration of the year every subscriber would receive a shareholder's ticket, which would be saleable or transferable. The above was the paper referred to in the following agreement, which was signed by the plaintiff and several other persons:—

"We, whose names are hereunder subscribed, do hereby consent and agree to and with the present and any future directors of the *British Metropolitan Tontine* as follows:— First, we do each of us agree to become subscribers thereto, and to take such number of shares upon such life or lives as is or are set forth against our respective names; secondly, we do acknowledge the plan or prospectus hereto annexed, to contain the nature and intent of the said Tontine, so far as the same is therein expressed, and do ratify the same in every respect and agree to abide thereby; thirdly, we do agree to ratify and confirm all rules, laws, and regulations passed, or which shall at any time hereafter pass, for the further promotion, direction, management, and carrying into effect the said Tontine, and to sign any deed or deeds to that effect; fourthly, we do agree to pay our subscriptions for one year."

An account was opened at the banking-house of Messrs. *Carr Glyn* and Co. *London*, entitled "*British Metropolitan Tontine.*" The plaintiff paid two sums of money,

1825.

NOCKELLS v. CROSBY.

amounting together to 308*l.* 6*s.* to the aforesaid account at Messrs. *Carr Glyn* and Co's. Various other subscribers to the Tontine paid sums of money to the same account, amounting in the whole, with the plaintiff's payments, to 737*l.* 10*s.* 6*d.* In the books of the *Metropolitan Tontine*, the following resolutions are entered:—

"General resolutions of the 19th of *January*, 1821.

First, that the books of the Tontine be opened to receive subscriptions, and that no less than 2*l.* per share shall be received in the first instance, being for the first monthly subscription.

Secondly, that the affairs and entire management of the concerns of the Tontine be vested in eight directors, any three of whom to be a sufficient quorum for the purpose of transacting business.

Thirdly, that *James Pope* be appointed secretary and solicitor to the directors of the Tontine, and that for such secretaryship he be paid such yearly salary as the present or any future directors may think fit.

Fourthly, that all monies to be received under or in virtue of the Tontine be paid into the hands of the treasurer or treasurers thereof, and that no monies be drawn for or paid by the treasurer or treasurers unless by draft to be signed by not less than three of the directors.

Fifthly, that the directors do, as often as occasion may require, place out at interest, in the names of the trustees, in government or other securities, all sums of money remaining in the hands of the treasurer."

30*th August*, 1822.

"Resolved, by a quorum of the directors present, that there not being a sufficient sum subscribed to warrant the further prosecution of the scheme, the subscribers have returned to them the amount of the subscriptions, less the expense attending the same, and that such expenses be scertained at another meeting of the directors, to be held at the secretary's house, the 6th of *September* next."

1825.

NOCKELLS v. CROSBY.

Old Bethlem, 6th *September*, 1822.

"Resolved, by a quorum of the directors present, that the expenses attending the prosecuting the scheme of the Tontine do amount to the sum of 3*l*. 19*s*. 7*d*. per share, and that each subscriber have the amount of his subscription returned, less the said 3*l*. 19*s*. 7*d*. per share."

On the 27th of *May*, 1822, the plaintiff wrote to the directors, requesting to have his money returned immediately, and said he understood it was to be returned subject to some small charge, and he did not then make any objection to the charge. On the the 25th of *July*, 1822, he again wrote and complained of the delay in returning his money; and that he had been put off from time to time in consequence of charges attending the concern. In *September*, 1822, several checks signed by the defendants were drawn on Messrs. *Carr Glyn* and Co. for different sums of money, amounting in the whole to the said sum of 737*l*. 10*s*. 6*d*. which checks were paid by them from the money paid into the aforesaid account. One of such checks for 252*l*. 11*s*. was made payable to the plaintiff or bearer, and placed by the defendants in the hands of Mr. *Pope*, the secretary, with instructions to deliver it to the plaintiff; but the plaintiff refused to accept the same in satisfaction of his claim, and the said Mr. *Pope*, without the knowledge or authority of the said defendants, paid the said check into his own private account at the bank of *England*, through which the same was presented to and paid by Messrs. *Carr Glyn* and Co. Previous to the commencement of the present action the plaintiff had sued Mr. *G. C. Glyn*, one of the partners in the banking-house of Messrs. *Carr Glyn* and Co. for the money sought to be recovered in this action, but had afterwards discontinued that suit. On the trial, Mr. *Pope*, the secretary of the *Metropolitan Tontine*, being called as a witness for the defendants, stated that the expenses of the institution amounted to 3*l*. 19*s*. 7*d*. a share, making 47*l*. 15*s*. on the plaintiff's twelve shares; that the expenses consisted in stationary, printing, advertisements, postages, and 75*l*. paid

1825.

NOCKELLS v. CROSBY.

to the witness for his trouble; that he explained this to the plaintiff, and offered him the balance 252*l.* 11*s.* which he refused; that none of the money was appropriated to their own use by any of the defendants. He further stated that the money paid by the subscribers had not been laid out at interest, but remained in the hands of the bankers with whom the account was opened, and that the defendant *Mitchell* and he (the witness) alone caused the prospectus to be put forth, and prosecuted the scheme themselves. That the defendant *Crosby* was not a subscriber, and that he attended one meeting only when the checks were signed. The question for the opinion of the Court is, whether the plaintiff is entitled to recover the whole of the money claimed in this action.

Campbell, for the plaintiff. It is clear that this action is maintainable for the whole sum which the plaintiff subscribed and paid in the purchase of the shares in question. The inducement to the plaintiff to advance the money, was the faith which he reposed in the projectors of this scheme that they would carry the plan on to maturity and perfection. Failing to do so, then the consideration for advancing the money failed, and this action is maintainable for all the money, as money had and received by the defendant to his use, *Farmer* v. *Russell* (*a*). It cannot be said that this was an association within the intent and meaning of the 18th and 19th sections of the 6 *Geo.* 1. c. 18. and therefore illegal, and consequently that all contracts relating to the purchase of shares therein are void. To bring an association of this kind within the operation of that statute, it must have a tendency to prejudice great numbers of the king's subjects, the shares must be transferable without restriction, and the members must assume to act as a corporate body without an act of parliament or a royal charter. None of these indicia of illegality exist in this case. There is nothing illegal in the principle of the association, the object being merely to subscribe money to a joint fund with benefit of

(*a*) 1 B. & P. 296.

1825.

NOCKELLS v. CROSBY.

survivorship. But assuming that if the plan had been carried to perfection according to the prospectus, it would be a case within the *South Sea* Bubble Act, still as it was never carried into operation, but was abandoned, the defendants are bound to refund the money which the plaintiff had been induced to advance in consideration of the scheme being carried on successfully. The consideration upon which it was paid has failed, and the case of *Farmer* v. *Russell*, already cited, shews that the legality of the consideration cannot come into question in a case like the present. This case is distinguishable from those cases where it is held that money paid to a stakeholder and by him paid over upon an illegal wager, cannot be recovered back. It rather comes within the principle of *Cotton* v. *Thurland* (a) and *Smith* v. *Bickmore* (b), which hold, that if the money be not paid over the action is maintainable. Then as there can be no objection which goes to the action itself, what is there to prevent the plaintiff recovering the whole of the money, free of any deduction on the score of expenses incurred in the prosecution of the plan? This is not like the case of a partnership, in which it might be said, that each partner is bound to bear his share of the common expenses attending the prosecution of the scheme. He is not the proposer of the scheme and is only induced to purchase shares on the faith that it will be carried into operation. If it fails, why is he to bear any of the expense, when he is neither a contributor to, nor a party to any contract binding him to bear the burthen of its failure? At all events in order to justify any deduction, it must be shewn that the defendants had power to charge the shareholders with the expenses of the scheme, and that the plaintiff was a party to any regulation conferring upon them such a power. Now no such power exists. It is true they were authorized to make rules and regulation for *carrying* on the scheme, but not for its *abandonment*, still less to tax the shareholders with the expenses incurred in its prosecution.

(a) 5 T. R. 405. (b) 4 Taunt. 474.

E. Lawes, contrà. The plaintiff's own conduct is an answer to the argument last addressed to the Court, and shews that the defendants are at all events entitled to deduct the share of expenses attending the prosecution of the scheme with which they seek to charge him. It appears from the case that the plaintiff at least did not object to the abandonment of the scheme, as his letters, written previously to the resolution of the 30th *August*, 1822, import. These letters also shew that he was not unwilling to pay his proportion of the expenses. The case states, that on the 27th *May*, 1822, the plaintiff wrote to the directors, requesting to have his money returned immediately, and said, he understood it was to be returned subject to some small charge, and he did not then make any objection to the charge. After this it is too late to say, either that the scheme was abandoned without his privity, or that he did not consent to pay his portion of the expenses. But there are two answers to this action; first, that the money is not money had and received *by these defendants* to the plaintiff's use; and second, that it is brought in furtherance of a contract respecting shares in a scheme, which is void within the intent and meaning of the statute 6 *Geo.* 1. c. 18. First, was this money had and received by the defendants? There is no proof that the defendants ever received any of the plaintiff's money. The money has been received by Mr. *Pope*, and therefore the plaintiff's remedy is against the person who has the money. There is no contract subsisting between the plaintiff and the defendants. They have never accounted to, or contracted with the plaintiff so as to make themselves personally liable to him. There is no privity whatever between them, and therefore this is an answer to the action. But secondly, this case falls within the very terms of the Bubble Act. Here the defendants have assumed to act as a corporate body without an act of parliament, or a royal charter, and their shares are transferable, for anything that appears to the contrary, without any restriction whatever.

1825.
NOCKELLS
v.
CROSBY.

The late case of *Josephs* v. *Pebrer*(*a*) seems a decisive authority upon this point, and therefore on both or either of these grounds the action is not maintainable.

Campbell, in reply. The case of *Josephs* v. *Pebrer* is perfectly distinguishable from this, because there the *Equitable Loan Bank Company* had issued shares transferable without restriction from hand to hand; they had assumed to act as a corporate body without any lawful authority, and the scheme had a manifest tendency to prejudice and aggrieve great numbers of his Majesty's subjects. But here all these ingredients are wanting. As to the other objections, it is clear, first, that the defendants had received the plaintiff's money upon the condition that the scheme was to be perfected, and having failed so to do, the money was had and received by them to his use, without deduction; and second, as the defendants were primarily liable to him, it is no answer to the action, that the money has found its way into some other person's hands.

BAYLEY, J.—I am of opinion, that the plaintiff is entitled to recover the whole amount of his subscriptions, without any deduction whatever. There is no difficulty in two of the points on which Mr. *Lawes* relies, namely, that this money has never been received by these defendants, and that if it ever was, it has been drawn out and applied in the manner stated, with the consent and concurrence of the plaintiff. There is no doubt that this money was originally paid by the plaintiff into the hands of certain persons, who, for the purposes of this scheme, were the bankers of the defendant, and that it was so paid upon the prospect that it was to be there, as funds for the prosecution of a continuing scheme, which was ultimately to produce to the subscriber, those benefits which the plan held out. The money was afterwards drawn out of the bank by the defendants themselves, and having so drawn it out they were bound to see that

(*a*) Ante, 542.

it was properly applied. If they had paid the whole of it back to the plaintiff, or if they had paid it away by his direction, the plaintiff would have no right to complain: but if, without any actual or direct authority from him, (and under the circumstances of this case the law gave them no right to apply it without his previous authority and consent,) they did so apply it, I think the plaintiff is entitled to maintain this action, unless the defendants can protect themselves by shewing that this scheme is within the 6 *Geo.* 1. c. 18. and that the plaintiff was a party to it. It seems to me, however, that this case does not come within the operation of that statute. That act does not apply to every case in which a capital is raised by the subscription of small sums of money; unless the money is raised, "for the purpose of carrying on a mischievous project and undertaking, which tends to the common grievance, prejudice, and inconvenience of his Majesty's subjects, or great numbers of them, in their trade, commerce, or other lawful affairs." Can we predicate that this scheme has such a tendency? I think we are not warranted in assuming as a matter of law, that it had a mischievous object in view. A sum of money was to be raised by small subscriptions, but when raised it was not to be the subject of general speculation. It did not interfere with persons carrying on trade; it was a plan, merely to form a growing fund, which was to inure for the benefit of survivors. I cannot say that that was a mischievous object; on the contrary, I am rather inclined to think it was beneficial, because it tended to encourage the prudential saving of capital in times of superabundance. But assuming the principle of the scheme to be within that statute, still I think it is no answer to an action to recover back money subscribed towards a scheme which has proved abortive, and where no transferable shares have been created, and when the period, at which it might come within the statute had not arrived. It seems to me, therefore, that the defendants having received the plaintiff's money, and having applied it without his consent or authority, they are liable to

1825.

NOCKELLS v. CROSBY.

account for it to him, unless they were warranted in retaining it under the circumstances of this case. Now what circumstances are there here to justify them in point of law in applying any part of this money without his express consent? Though the witness *Pope* and the defendant *Mitchell* were the original projectors, yet it appears, that the printed prospectus was circulated with the authority of all the defendants, and therefore they having lent themselves to it they must all be bound by its obligations. Of course, upon every object of this kind there must be some expense incurred before persons become members of the association. Then, the question is, on whom ought that expense to fall—upon the original projectors, or upon those persons who come in upon the notion that it is a scheme which will go on? The reason of the thing is, that it should fall on the original projectors; and not upon those who pay their money upon the principle that it will be an available object. The defendants here hold out, that there is to be a tontine, and this party pays his money in the confidence that the scheme will be perfected. It turns out that the scheme will not succeed. They have the benefit and use of his money in their hands, and having had that use of it, why is he to incur the expense of an abortive plan? Are they to say that he came in merely as a party who was to be one of the members, if it answered, but if it should fail, he was to derive no benefit from it? The plan proposed, that the amount of the subscriptions should be from time to time laid out in government or other securities, the net profits of which were to be divided twice in every year; instead of which his money has been lying dead for a year and a half; and he is not to have it returned without being saddled with a heavy expense to which he was not privy. It seems to me that the loss ought to fall on the projectors, and that they are not entitled to deduct any thing from the plaintiff's money. They are not at liberty to say to him, " It is true we cannot hold this money any longer, but we will return you so much as may remain, after deducting those

expenses which you never agreed to pay." There would, however, have been another ground, on which a deduction ought not to be allowed, if I were of opinion that there might have been a deduction to a certain extent. It was the duty of the directors to lay out the money from time to time in government or other securities; and if the plaintiff's money had been so laid out, even at 3 per cent., there would have been a profit on it of about ten guineas. Therefore they must be considered as in possession of that money which he ought to have received. There is another sum also, which I think they could not at all events have been entitled to deduct, namely, the sum charged as part of what was paid to Mr. *Pope*. By one of the resolutions the directors were to fix the secretary's salary for his trouble. It appears they never did fix it, and therefore it seems to me that they would not be warranted in making this deduction from the plaintiff's share to the amount of 30*l*. How can it be predicated that *Pope* had been working for him and for his benefit to the amount of 30*l*. I observe also, that this money was not paid while the society was going on, but subsequent to the period at which the scheme was dropped. The whole money contributed remained in their hands until *September*, 1822, and therefore it seems to me, that the directors were not then at liberty to apply it in payment of any sum due to Mr. *Pope*, so as to charge the plaintiff. But upon the general principle that the expenses of an undertaking, where the project proves abortive, ought to fall upon the projectors themselves, and not upon a person who is merely a contributor, I am of opinion that the plaintiff is entitled to recover the amount of all the money which he had paid.

HOLROYD, J.—At the commencement of the argument I had very considerable doubt whether the plaintiff was entitled to recover the whole of the money free of any deduction for the expense of carrying on this plan, but I am now quite satisfied that he is entitled to recover the whole. It is clear that he was not liable to contribute towards the

1825.

NOCKELLS v. CROSBY.

money paid to Mr. *Pope*. By the third resolution the secretary was to have such annual salary as the directors should fix. No salary was ever fixed, and, therefore, with respect to the money paid to Mr. *Pope* the plaintiff could not be liable. It appeared to me, at first, that this was very like the case of a partnership, where a given number of partners contributed towards a fund for carrying on a concern, and in the carrying on which, expenses being incurred, each partner was liable to contribute his portion towards the expenses incurred; but as I think this scheme was never properly set going, I am now of opinion that the principle of copartnership does not apply. Considerable expenses are, it is true, incurred in the way of forming a prospectus and setting it going, but the expenses so incurred, unless the subscribers became otherwise bound, ought not to be borne by them unless the scheme was actually in operation. Here the scheme was never in operation. As soon as the subscriptions were raised, the money was to be laid out in the formation of a tontine. That was the gist, and essence, and object of the scheme, but no steps were taken to carry it into effect, and, therefore, it appears that all the proceedings until that time were merely preparatory, and therefore the expenses are not payable out of the subscribers fund, but are only payable by those who commenced the plan in the first instance. In many cases, under acts of parliament for the purpose of raising different sums of money for a given object, the expenses of raising the money are not to be paid out of the sum raised, unless there be a provision in the statute to that effect. I think, therefore, in this case the plaintiff is entitled to recover.

LITTLEDALE, J.—I am also of opinion in this case that the plaintiff is entitled to recover, upon the general principle, that if a number of persons propose a scheme for an undertaking of this kind and assume the names of secretary, solicitor, or any other officers, until the proposed scheme is once set going, they are to pay all the expenses. There

is no doubt, if it is once set going and has begun to operate, all the expenses are to be paid out of the sums subscribed by the general subscribers; and I think it *then* right and equitable, not only that the expenses of management should be paid out of that fund, but also that the persons who have advanced the money by which the benefit of the scheme has accrued, should have that money considered as general expenses of management, and be repaid. It is by means of that money that the general subscribers get at the advantages and profits of the scheme; and therefore they should pay all the expenses that have been incurred in making that scheme, of which they derive the benefit, available. The object of this scheme was, that the money advanced should be vested in the names of trustees and be from time to time laid out by them in government securities, and the proceeds equally divided. Instead of investing the money they suffer it to lie idle. Probably they did not think it worth while to open an account with the bank, but that is the affair of the directors themselves. The subscribers only pay their money down for the purpose proposed, and if the directors do not so appropriate it, that is their own consideration. Suppose there had been no subscriber at all, they must have paid the expenses themselves. Suppose there had been but one subscriber, it would be very hard upon him if the directors could be allowed to say, "we cannot let you have any benefit from this scheme, because there are no more subscribers. We find you are the only person who has subscribed, and therefore we charge you with the whole expense that has been incurred." This case is nearly the same. There were very few subscribers. The plaintiff subscribed nearly one half of the whole money subscribed in 1821 and 1822, and then he is told that the scheme is abandoned. He is then told, "we cannot go on with this, your money has not been appropriated to the purpose for which you subscribed it. It has not only been lying idle, but you must pay all the expenses which we have incurred in endeavouring to establish a scheme which we have

1825.

NOCKELLS v. CROSBY.

never set on foot, but abandoned." The hardship would be monstrous; and, therefore, I think that until the scheme was established, and the money laid out in government securities as proposed by the prospectus, they held the plaintiff's money for his use. With respect to the expenses incurred, they were in the same situation as if no money had been subscribed. For these reasons I think the plaintiff is entitled to recover.

Postea to the plaintiff.

Between THOMAS DUFFIELD, Esq. and EMILY FRANCES, his Wife, *Plaintiffs*, and AMELIA MARIA ELWES, Widow, FRANCIS CONST and GEORGE LAW, ABRAHAM HENRY CHAMBERS, the Rev. WILLIAM HICKS, Clerk, and GEORGE THOMAS WARREN HASTINGS DUFFIELD, CAROLINE DUFFIELD, MARIA DUFFIELD, ANNA DUFFIELD, and SUSAN ELIZA DUFFIELD, Infants, by GEORGE HENRY CRUTCHLEY, Esq. their Guardian, *Defendants*.

CASE sent by his Honour the Vice-Chancellor, for the opinion of this Court.

Indentures of lease and release and assignment, by way of voluntary settlement, dated the 6th and 7th of *October*, 1802,

Testator having by voluntary settlement conveyed his manor of *M.* to trustees, in trust to secure the payment of an annuity to his wife for life, and subject thereto, to the use of himself in fee, by his will confirmed that settlement, and having then an only daughter, devised his freehold and copyhold estate in *S.* and his freehold estate at *H.* to trustees, in trust for the children of his daughter by her then husband, under certain limitations. By the residuary clause, he devised all the residue of his freehold and copyhold estates, money in the funds, &c. to the same trustees, upon trust to sell and convert the same into money, and set apart 50,000*l.* three per cent. consols, for such son of his daughter, who, under the trusts of a settlement *then intended to be forthwith made*, should become possessed of an estate tail in the manor of *M.*, and the residue to be divided among the other children of his daughter. At the date of the will, testator's daughter had no children. Some time after making this will the testator drew a line across the direction to sell the property devised by the residuary clause. After so doing he purchased a considerable freehold estate in *W.* and *H.* By a codicil to his will, made ten years subsequently, after reciting the rasure before-mentioned, and that he was apprehensive that such rasure, not being witnessed, might lead to litigation, he declared that the sole intention of such rasure was to revoke that part only of the will whereby he directed the sale of his freehold property, and then proceeded, "And I do hereby direct and appoint that the son lawfully begotten of my daughter Mrs. *D.* who

were duly made and executed by the testator *George Elwes*. By the indenture of release, expressed to be made between the said *G. Elwes*, therein described as of *Marcham*, in the county of *Berks*, Esq. of the first part, the defendant, *Amelia Maria Elwes*, his then wife and now widow, of the second part; and *John Elwes* and *Francis Wastie*, both since deceased, of the third part; after reciting that the said *G. Elwes* was seised in fee simple of the manor, messuages, farms, lands, and hereditaments thereinafter granted and released, and was also possessed of the leasehold messuages, lands, tithes, and other premises thereinafter assigned; and reciting, that the said *G. Elwes* had issue by his said wife, one daughter, namely, the plaintiff, *Emily Frances Duffield*, then an infant of the age of eleven years, or thereabouts, and no other child, and reciting that it had been deemed expedient, and that the said *G. Elwes* had agreed, that a settlement, or suitable provision, should be made for his said wife and for their said daughter and her issue, in addition to the provision secured and provided for them by the settlement

shall first attain the age of twenty-one years, shall, on attaining such age, change his name for that of *E.*; and I give and devise to the said son of my daughter on his attaining the age of twenty-one years and changing his name to *E. all my freehold property, lands, tenements, and hereditaments, to have and to hold to him, his heirs and assigns for ever.*" By the same codicil he ratified and confirmed the afore-mentioned will, except as before excepted. Testator died without again altering his will or codicil, and without making any settlement, stated in the residuary clause to be then in immediate contemplation, leaving his widow and daughter him surviving. At the death of the testator, Mr. and Mrs. *D.* had, and now have, one infant son and four infant daughters. A case being sent from Chancery, this Court held,—

1. That the devise of the freehold part of the estate at *S.* and of the freehold farm and estate at *H.* contained in the will, was not revoked by the codicil.

2. That the manor of *M.* did pass under the residuary devise contained in the will, and that such devise was revoked by the codicil.

3. That the manor of *M.* did pass under the codicil to the first son of Mrs. *D.* who shall attain twenty-one years and change his name to *E.*

4. That the estate at *W.* and *H.* purchased after the testator made his will, passed, under the devise in the codicil, to the first son of Mrs. *D.* who shall attain twenty-one years and change his name to *E.*

5. That the surplus rents and profits of the copyhold estates at *S.* and of the freehold estate at the same place, and of the freehold farm and estate at *H.* after providing for the maintenance of the devisee thereof, belong to the surviving trustee under the will, until a first son of Mrs. *D.* shall attain twenty-one years, &c. and

6. That the intermediate rents and profits of such of the testator's freehold estates as are effectually devised by the codicil to Mrs. *D.*'s son, who shall first attain twenty-one years, and change his name to *E.* until such events take place, belong to the surviving trustee.

made upon the marriage of the said *G. Elwes* with his said wife: the testator granted, bargained, sold, alienated, and released, unto the said *J. Elwes* and *F. Wastie*, and to their heirs and assigns for ever, all that the manor of *Marcham*, in the county of *Berks*, with its rights, members, and appurtenances, together with the several lands, tenements, rents, hereditaments, belonging or reputed to belong to the said manor therein mentioned, comprising (among other lands and hereditaments in possession therein described) the capital messuage, or manor-house, gardens, and park, situate at *Marcham*, and the reversion of certain other lands, after the termination of certain subsisting terms of one thousand years, therein, situate within the parish of *Marcham*, but not within the manor of *Marcham*, and the reserved rents then payable for the same, and the tithes of some part of such lands, and also certain other messuages, &c. in the parishes of *Marcham* and *Frilford*, but not within the manor of *Marcham*, and all other the freehold lands, &c. of the said *G. E.* situate in *Marcham*, *Frilfold*, *Cotwell*, or elsewhere, in the county of *Berks*, with the appurtenances; to hold unto the said *J. Elwes* and *Francis Wastie*, their heirs and assigns, for ever; but, nevertheless, to the uses and upon the trusts and agreements thereinafter limited and declared concerning the same; first, to levy out of the issues and profits, and pay to the defendant *Amelia Maria Elwes* an annuity of 800*l.* during the joint lives of her and her daughter, if the daughter so long continued to live with her; but if the daughter died or ceased to live with her, then to raise and pay to *A. M. Elwes* an annuity of 400*l.* for her life, (other trusts were then declared not necessary to set out); but in case his daughter should die unmarried in the life-time of the testator, or should marry without his consent, then, subject to the annuity of 400*l.* to *A. M. Elwes*, to the use of himself in fee. The deed then contained an assignment of certain leasehold property to the same uses.

Indentures of lease and release, bearing date respectively the 14th and 15th days of *October*, 1807, were afterwards

duly executed by the said *G. Elwes* only. By the release which was expressed to be made between the said *G. E.* of the first part, and the said *J. Elwes* and *F. Wastie* of the second part, reciting the former deeds, and that he had since purchased a mansion, called *Oakley-house*, and other premises in *Marcham*, he conveyed the same, and all household goods, furniture, &c. to *J. Elwes* and *F. Wastie*, upon the same trusts and to the same uses as are above-mentioned. In *February*, 1810, the plaintiff, *Emily Frances Duffield*, the only child of the said *G. Elwes*, and then a minor, intermarried with the plaintiff, *Thomas Duffield*, without the consent of her father *George Elwes*. The said *G. Elwes* did no act subsequently to affect his interest in the manor of *Marcham* before the date of his will, and at the date of that will he was seised in fee simple of other freehold estates in the counties of *Berks*, *Surrey*, *Middlesex*, and *Suffolk*. He was also seised in fee simple of some copyhold estate, and was possessed of a very large personal estate, consisting of leaseholds for years, monies in the funds, and other particulars. By his will, dated the 1st of *March*, 1811, duly executed and attested to pass freehold estates, the said *G. Elwes* first willed, that his debts, funeral and testamentary expenses, should be paid as thereinafter mentioned; and after reciting that by a settlement made previous to the testator's marriage with his wife, the defendant Mrs. *Elwes*, she would be entitled to the dividends of a sum of three per cent. consolidated bank annuities therein mentioned, for her life, in case she survived the testator, in the nature of a jointure, and in lieu of dower, and that the same bank annuities were, by the said settlement, directed to be in trust after the decease of the testator and his wife for the child or children of their marriage, the will proceeds in the following words:—

"And whereas, under and by virtue of the limitations contained in a certain indenture of settlement, bearing date on or about the 7th day of *October*, in the year 1802, and expressed to be made between me *George Elwes* of the first part, my said wife *Amelia Elwes* of the second part,

1825.
DUFFIELD v. ELWES.

and *John Elwes*, Esq. and *Francis Wastie*, Esq. of the third part, my said wife is entitled for her life to an annuity or yearly rent charge of 400*l.* issuing and payable out of the manor of *Marcham*, in the county of *Berks*, and divers freehold and leasehold messuages, farms, lands, tenements, and hereditaments, in the several parishes or places of *Marcham, Frilford, Cotwell*, and *Garford*, and elsewhere in the county of *Berks*: now I do by this my will ratify and confirm the said jointure and annuity to my said wife." The testator then bequeathed to "his dear daughter," the plaintiff Mrs. *Duffield*, and her assigns for her life, his leasehold messuage or dwelling-house, with the appurtenances, situate in *High-street, Mary-le-bone*, and declared that the same should after her decease fall into the residue of his personal estate thereinafter devised. And he gave and bequeathed to his said daughter, all his carriages, household furniture and goods, plate, linen, china, stock of wines, and other liquors, which should be in or about the said messuage or dwelling-house, or in or about any other house or houses which he might inhabit at the time of his decease. And the testator then gave and bequeathed unto his brother, the said *John Elwes*, Esq. (who died afterwards in the testator's life-time,) and the defendant, *Abraham Henry Chambers*, and their heirs, all that the testator's freehold and copyhold estate, situate, lying and being in *Southwood Park*, in the county of *Suffolk*, which he had lately purchased from *John Pytches*, Esq. the copyhold part whereof he recited that he had already surrendered to the uses of his will; and also all that his freehold farm and estate at *Haverhill*, in the county of *Essex*: to and for and upon such trusts as are in and by his said will expressed and declared thereof; (that is to say) in case there should be but one son of his daughter, the plaintiff, Mrs. *Duffield*, by her husband, the plaintiff, *Thomas Duffield*, who should attain the age of twenty-one years, upon trust for such son, his heirs and assigns for ever, and in case there should be two or more sons of Mrs. *Duffield* by the said *Thomas Duffield*, who should attain the age

of twenty-one years, then in trust for the second of such sons, his heirs and assigns for ever; and in case there should be no son of Mrs. *Duffield* by the said *Thomas Duffield*, who should attain the age of twenty-one years, then upon trust for such of the daughters, if any, of Mrs. *Duffield*, by the said *Thomas Duffield*, as should first attain the age of twenty-one years, or be married under that age with the consent of the trustee, or trustees, for the time being of that his will, and the heirs and assigns of such daughter, for ever; but if there should not be any son of Mrs. *Duffield*, by the said *Thomas Duffield*, who should attain twenty-one, nor any daughter who should attain that age or be married, and the said *Thomas Duffield* should die leaving the said testator's daughter, Mrs. *Duffield*, him surviving, then upon the same trust for the benefit of the children, as well sons as daughters, of Mrs. *Duffield* by any second husband with whom she might happen to intermarry, as were thereinbefore declared concerning the said freehold and copyhold farms and estates for the benefit of the children of Mrs. *Duffield* by the said *Thomas Duffield*; but if there should not be any son of Mrs. *Duffield*, by such after-taken husband, who should attain twenty-one, nor a daughter who should attain that age or be married with such consent as aforesaid, then upon trust for the said *J. Elwes* in fee. The testator then bequeathed to his trustees a sum in the public stocks of *Great Britain*, sufficient to pay certain persons annuities during their lives, and upon their deaths the principal sum to fall into the residue of his personal estate. He also gave 1,500*l.* three per cent. consolidated bank annuities to the poor of *Marcham*; and then after bequeathing certain small legacies, and giving each of his executors 500*l.* the will proceeds in the words following, (that is to say,) "And as to, for, and concerning all the rest, residue and remainder of the property of which I shall be possessed, or to which I shall be entitled at the time of my decease, or over which I have a disposing power, whether the same consist wholly or in part of estates of freehold, copyhold, or for years, money divided

1825.

DUFFIELD v. ELWES.

funds, upon mortgage, or otherwise out upon security or at interest, debts, or of whatever other nature the same or any part thereof may be, I give, devise and bequeath the same, and every part thereof, unto the said *J. Elwes* and *A. H. Chambers*, their heirs, executors, administrators, and assigns, upon trust that they the said *J. Elwes* and *A. H. Chambers*, or the survivor of them, or the heirs, executors, administrators, or assigns of such survivor, do and shall, with all convenient speed after my decease, sell, dispose of and convey all and singular my freehold, copyhold, and leasehold estates, with the appurtenances, either together or in parcels, and either by public auction or private contract, as to him or them shall seem best, unto any person or persons who shall be willing to become or be the purchaser or purchasers thereof, or of any part thereof, for the most money and best prices that can be reasonably had or gotten for the same, and to make and execute all such deeds, surrenders, conveyances, assignments, and assurances in the law as shall be necessary or proper for perfecting the sale and transfer thereof; and also do and shall make sale and convert into money all such part and parts of my personal estate and effects as shall not consist of money, and call in and compel payment of all such parts thereof as shall consist of money out upon mortgage or other security, at interest or otherwise, and also get in all debts which shall be due and owing to me at the time of my decease, in such manner as they shall think expedient." And the testator, after declaring that the receipts of the said *J. Elwes* and *A. H. Chambers* should be good discharges, directed that the said *J. Elwes* and *A. H. Chambers*, and the survivor of them, his executors, administrators, and assigns should stand possessed of and interested in the monies to arise or be gotten in by the means aforesaid or otherwise, under or by virtue of that his will; in trust, in the first place, from and immediately after his decease, to satisfy and discharge all such debts as should be due and owing by him to any *field* or persons whomsoever at the time of his decease or

which should afterwards become due, and in the next place to pay the funeral expenses, and then to pay the several legacies and bequests which he had given or bequeathed, or should give or bequeath by that his will, or by any codicil or codicils thereto, and after full payment and satisfaction thereof, in trust forthwith to lay out and invest such a portion of the residue of the monies to arise and be produced by the means aforesaid in the purchase of so much and such sum of three per cent. consolidated bank annuities, in the names of the said *J. Elwes* and *A. H. Chambers*, or of the survivor of them, his executors, administrators, or assigns, as the yearly dividends thereof would amount to the sum of 1,000*l.*, and upon trust during the natural life of Mrs. *Duffield* to pay the dividends of the said three per cent. consolidated bank annuities so to be purchased to Mrs. *Duffield* for her separate use. And the said testator directed that the said three per cent. consolidated bank annuities so to be purchased as last aforesaid, should, from and after the decease of his daughter Mrs. *Duffield*, fall into and be taken as part of his said personal estate and be disposed of in manner thereinafter declared thereof. The will then declared that as to the then residue of the monies to arise and be produced by the sales thereinbefore directed to be made of the testator's real and personal estate, the trustees should be possessed thereof upon trust to invest the same in the purchase of parliamentary stocks, or upon real securities at interest, in the names of the trustees, upon the trusts thereinafter expressed, viz. in case there should be only one child of Mrs. *Duffield*, by the said *T. Duffield*, in trust to pay, assign, transfer, or assure the said stocks, funds or securities, and the dividends and interest thereof, unto such only child, on his attaining the age of twenty-one years, if a son; or on her attaining that age, or being married, with the consent, in writing, of the trustees for the time being of his will, if a daughter; and in case there should be but two or three children of Mrs. *Duffield* by the said *T. Duffield*, then upon trust for such two or three children, equally to be divided

1825. DUFFIELD v. ELWES.

between them, share and share alike; the shares of sons to be paid or assured to them on attaining twenty-one, and the shares of daughters to be paid or assured to them on attaining twenty-one, or being married with such consent as aforesaid. Then followed a clause of survivorship among such children in case of sons dying under twenty-one, or daughters dying before twenty-one or marriage, and a proviso for the children of a son dying under twenty-one, leaving lawful issue, to take their father's share. The will then proceeded as follows:—"And my will is, that in case there shall be four or more children of the said *Amelia Maria Frances Duffield* (meaning the plaintiff, Mrs. *Duffield*, she being so named by mistake throughout the will) by the said *T. Duffield*, that the said *J. Elwes* and *A. H. Chambers*, and the survivor of them, his executors, administrators and assigns, should stand and be possessed of the said stocks, funds and securities, and the dividends, interest, and annual proceeds thereof, upon trust, in the first place, to purchase with a competent part thereof, or otherwise to set apart thereout, the sum of 50,000*l.* three per cent. consolidated bank annuities, and to stand possessed thereof, and of the dividends, interest, and annual proceeds thereof, in trust for such son of the said *Amelia Maria Frances Duffield* by the said *Thomas Duffield*, who, under the trusts of a settlement now intended to be forthwith made, shall become possessed of an estate tail in the said manor of *Marcham*, and the messuages, farms, lands, tenements, and hereditaments, which shall be comprised in the same settlement, and subject to the payment or setting apart of the said sum of 50,000*l.* three per cent. consolidated bank annuities, my will is, that the said *J. Elwes* and *A. H. Chambers*, and the survivor of them, his executors, administrators and assigns, shall stand and be possessed of the then residue of the said stocks, funds and securities, and the dividends, interest, and annual proceeds thereof, upon trust for such four or more children, exclusive of such son as last aforesaid of the said *A. M. F. Duffield*, by the said *T. Duffield*, equally to be divided be-

tween them, share and share alike, and to be paid, assigned, transferred, or assured to them respectively, at the same time or times, and with such benefit of survivorship amongst them, and in such manner in all respects as is hereinbefore directed and declared of and concerning the said stocks, funds and securities, and the dividends, interest, and annual proceeds thereof, in the event of there being only two or three children of the said *A. M. F. Duffield*, by the said *T. Duffield*." The will then provided that in case the said *T. Duffield* should die, leaving the plaintiff surviving him, and without leaving issue by her, or if he should leave issue by her, and all such issue, being sons, should die under twenty-one, and without lawful issue, and being daughters, should die under that age, and without having been married with such consent as aforesaid, then the said trustees should, from and after such the decease of the said *T. Duffield*, and such failure of issue as aforesaid, stand possessed of the stocks, funds and securities, in or on which the monies to arise and be produced from the residue of the testator's real and personal estate thereinbefore devised under the trusts thereinbefore declared thereof, should be laid out or invested, upon trust, to pay the interest and dividends thereof, from time to time, during the life of Mrs. *Duffield*, to such persons as she should in writing appoint, and in default of appointment, upon trust to pay the said interest and dividends to herself for her separate use; and in case the plaintiff, Mrs. *Duffield*, should happen to marry a second husband, and there should be issue of her body by such second husband, the testator directed that his trustees should, from and after her decease, stand possessed of the said stocks, funds and securities, and the interest, dividends, and annual proceeds thereof, upon such and the same trusts, for the benefit of the children of such second marriage, as were by that his will declared of and concerning the same stocks, funds, securities, interest, dividends, and annual proceeds, for the benefit of the children of the plaintiff, Mrs. *Duffield*, by the said *T. Duffield*; and in case of the decease of the

1825. DUFFIELD v. ELWES.

plaintiff, Mrs. *Duffield*, without leaving any issue of her body, who, by virtue of the trusts of that his will, should become entitled to the said stocks, funds or securities, and the dividends, interest, and annual proceeds thereof, then the testator gave, bequeathed and disposed of the same stocks, funds and securities, and the dividends, interest, and annual proceeds thereof, in manner therein mentioned; that is to say, he then gave 1,000*l.* three per cent. consolidated bank annuities to the said *J. Elwes* and *A. H. Chambers*, their executors, administrators and assigns, upon trust that the interest and dividends thereof might, from time to time, for ever, be paid to the minister, churchwardens, and overseers for the time being, of the parish of *Marcham* aforesaid, to be applied by them in the same manner as the dividends of the sum of 1,500*l.* like bank annuities, thereinbefore given to them. And the testator gave sundry pecuniary legacies: and as to, for and concerning all the then residue of the said stocks, funds and securities, and the interest, dividends, and annual proceeds thereof, he gave and bequeathed the same and every part thereof unto the said *J. Elwes*, his executors, administrators and assigns, for his and their own use and benefit, and to be paid, assigned, transferred, and assured to him and them accordingly. And the testator further willed that his trustees should, by and out of the rents, issues and profits of the said freehold and copyhold estates by that his will first devised, and by and out of the part or share of and in the said stocks, funds and securities, and the dividends and interest thereof, to which any child or children of the plaintiff, Mrs. *Duffield*, by the said *T. Duffield*, or by any after-taken husband, should be presumptively entitled, pay and apply for the maintenance and education of any such child or children in the mean time, and until his, her or their share or portion, shares or portions, should become payable, such yearly sum and sums of money as to the trustees should seem meet. And the testator empowered his trustees, from time to time, when necessary, to alter and vary the securities upon which the

1825.

DUFFIELD v. ELWES.

money arising from the said residue of his real and personal estate, thereinbefore bequeathed, should, under the trusts thereinbefore declared thereof, be invested; and he also empowered the trustees, for the time being, of his will, during the minority of such child of Mrs. *Duffield*, as by virtue of the limitations thereinbefore contained should be presumptively entitled to the said freehold and copyhold estate, first thereinbefore devised, to demise or lease all or any part of the said freehold and copyhold estates, for any term not exceeding twenty-one years in possession, and with such clauses and restrictions as therein mentioned. And the testator appointed the said *J. Elwes* and the defendant, *A. H. Chambers*, joint executors of that his will, and he thereby revoked all former and other wills by him at any time theretofore made, and declared that to be his last will and testament.

Some time after the making of his will the testator drew two cross lines with his pen over part of his will contained in the sixth sheet thereof, and which contained the direction for the sale of his residuary freehold, leasehold and copyhold estates (*a*). The testator, after making his will and before his codicil, purchased a considerable estate in fee simple, consisting of the manor of *Withersfield*, with the perpetual advowson of the rectory of *Withersfield*, and about 1283 acres of freehold land, situate in the parishes of *Withersfield* and *Haverhill* aforesaid, in *Suffolk*, and he was seised thereof at the times of making his codicil and of his death. He afterwards made and published a codicil to his will, bearing date the 3d *March*, 1821, duly executed and attested to pass freehold estates: the codicil was verbatim as follows: "Having some short time back drawn my pen through the first fifteen lines of the sixth sheet of my last will and testament, dated on or about the 1st day of *March*, in the year of our Lord 1811, and being apprehensive that such rasure not being witnessed might lead to litigation, I *George Elwes* do declare, by this my codicil to the said will, that

(*a*) Vide ante, p. 769–70.

1825.

DUFFIELD v. ELWES.

the sole intention of such rasure was and is to revoke that part only of the aforesaid will whereby I direct the sale of my freehold property, which sale I accordingly do hereby revoke; and I do hereby direct and appoint that the son lawfully begotten of my daughter *Emily Frances Duffield*, who shall first attain the age of twenty-one years, shall, on attaining such age, change his name for that of *Elwes*; and I give and devise to the said son of my daughter aforesaid, on his attaining the age of twenty-one years, and changing his name to *Elwes*, all my freehold property, lands, tenements, and hereditaments, to have and to hold to him my said grandson, his heirs and assigns for ever. Also I give and bequeath to my wife, *Amelia Maria Elwes*, for and during the term of her natural life, my dwelling-house, situate and being on the terrace in *High Street*, in the parish of *Mary-le-bone*: and I also give unto my said wife contents of the said house. And I do hereby nominate and appoint the Reverend *William Hicks*, of *Whittington* rectory, in the county of *Gloucestershire*, to be my executor, in the room of my late brother, *John Elwes*, Esquire, deceased. And I do hereby ratify and confirm the aforementioned will and testament, dated as aforesaid, except as is before excepted."

The testator never, after the making of his will, made any settlement whatever of the manor of *Marcham*, or of any other part of his property. On the 2d *September*, 1821, the testator died without revoking or altering his will, save as aforesaid, and without revoking or altering his codicil, leaving the defendant, *Amelia Maria Elwes* his widow, and the plaintiff *Emily Frances Duffield* his daughter, and only child and heir at law, and heir according to the custom of the manors whereof his copyhold estates were holden, and also his sole next of kin. The plaintiffs, Mr. and Mrs. *Duffield*, at the testator's death, had and now have living only five children, namely, their eldest child and only son, the defendant *George Thomas Warren Hastings Duffield*, now of the age of ten years, and four younger children, the infant defendants, *Caroline Duffield*, *Maria Duffield*, *Anna*

Duffield, and *Susan Eliza Duffield*. *John Elwes*, one of the executors and trustees named in the will, died before the testator; the other executor and trustee therein named survived him, being the defendant *Abraham Henry Chambers*.

Upon the hearing of this cause, before the Vice-Chancellor, his Honor directed this case to be made for the opinion of the Judges of this Court, and that the questions should be,

First, Whether the devise of the freehold part of the estate at *Southwood Park*, and of the freehold farm and estate at *Haverhill*, contained in the will, is revoked by the codicil?

Second, Did the manor of *Marcham* pass under the residuary devise contained in the testator's will, and if it did, was such devise revoked by the codicil?

Third, Did the manor of *Marcham* pass under the codicil to the first son of the plaintiff, *Emily Frances Duffield*, who shall attain twenty-one years, and change his name to *Elwes*, or to whom does the same belong?

Fourth, Does the estate at *Withersfield* and *Haverhill*, purchased after the testator made his will, pass under the devise in the codicil to the first son of the plaintiff, *Emily Frances Duffield*, who shall attain twenty-one years, and change his name to *Elwes*, or does it go to the residuary devisee, under the joint operation of the will and codicil, or does it descend to the testator's heir at law?

Fifth, To whom belong the surplus rents and profits of the said copyhold estates at *Southwood Park*, and of the said freehold estate at the same place, and of the said freehold farm and estate at *Haverhill*, (if the devise of such estates contained in the will was not revoked by the codicil,) after providing for the maintenance of the devisee thereof until a first son of the said plaintiff, *Emily Frances Duffield*, shall attain twenty-one years, or in failure of such son till a daughter shall attain that age, or be married with consent according to the will?

Sixth, To whom do the intermediate rents and profits of such of the testator's freehold estates as are effectually de-

1825.
DUFFIELD v. ELWES.

vised by his codicil to the son of the plaintiff, *Emily Frances Duffield*, who shall first attain twenty-one years, and change his name to *Elwes*, until such events take place, belong?

Tindal, for the plaintiffs. It is contended on the part of the plaintiffs, that the answer to be given by the court to the first question stated in the case, must be, that the devise of the freehold part of the estate at *Southwood Park*, and of the freehold farm and estate at *Haverhill*, contained in the testator's will, is not revoked by his codicil. I admit, that if the words of the codicil "all my freehold property, lands, tenements and hereditaments," had stood alone, they would have been sufficiently large to revoke the prior devise in the will, inasmuch as they would have set up a posterior and inconsistent disposition of the same property; but, in interpreting these words, the court will see whether they are not necessarily restrained by others accompanying them in the codicil. In all cases of wills, the court is anxious to advance the intention of the testator, if it can possibly be collected from his language, no matter how obscurely or inartificially expressed; and this rule is not confined to wills. Even as to deeds, the court always looks to the whole of the instrument in order to discover the intention of the party. Nothing is more common, in the case of a release, than that the general words of the release shall be restrained and controlled by the prior words of the recital. In *Thorpe* v. *Thorpe* (*a*), the court say, that though general words only in a release shall be taken most strongly against the releasor, yet where there is a particular recital in a deed, and then general words follow, the general words shall be qualified by the special words. So also the same rule applies to the condition of a bond; *Lord Arlington* v. *Berricke* (*b*); and the like doctrine holds as to the operative part of a grant by deed poll; *Oliver* v. *Daniel* (*c*). If this

(*a*) 1 Ld. Raym. 235.
(*b*) 2 Saund. 411. 1 And. 64. Moor, 133. See Cro. Jac. 623.
(*c*) 1 Meriv. 500,

be the rule of construction as to deeds, a multo fortiori, it applies to wills. The court, therefore, will look with great diligence and accuracy to the parts of the will, in order to see whether the general words which are found in the codicil, and which primâ facie import a revocation of the former devise, are not restrained by the words with which they are accompanied. Now looking at the codicil the intention of the testator is perfectly clear. He had already made his will, and then by his codicil he says, that he has drawn his pen through a certain part of it, which is in effect saying, that, wherever he had cancelled, there he meant to revoke his will. It therefore necessarily follows, or at least there is strong ground for presuming, that he did not mean to revoke any part which he had not so cancelled. He says, "Having some short time back drawn my pen through the first fifteen lines of the sixth sheet of my last will and testament, and being apprehensive that such rasure, not being witnessed, might lead to litigation, I do declare by this my codicil to the said will, that the sole intention of such rasure was, and is, to revoke that part only of the aforesaid will, whereby I direct the sale of my freehold property, which sale I accordingly do hereby revoke." This recital clearly shews he intended that all the other parts of his will, not cancelled, should stand. He then goes on to make a disposition of his property by the codicil, and though the words are very comprehensive, yet inasmuch as he sets out with stating the fact that he had cancelled a particular part of the will, and regard being had to his then state of mind, the fair construction of the subsequent devise is, that it was intended to have reference only to that part of the will which he had previously cancelled, and not to any other part. That this is the proper construction to be put upon the codicil is confirmed beyond doubt by the concluding expressions, "And I do hereby ratify and confirm the aforementioned will and testament, except as is before excepted." Now there is no exception here as to the devise of the *Southwood* and *Haverhill* freehold estates. They are not

1825.
DUFFIELD
v.
ELWES.

mentioned in the codicil; and if it is to be assumed that they are excepted it can only be by implication arising from the use of the general words to which I have adverted. If the testator had intended to change his previous devise of the *Southwood* and *Haverhill* estates, he would not have concluded his codicil in the language he uses, but he would have said " except so far as any other disposition of my property is made by this my codicil." But the very terms " except as is before excepted," refer to that part of the codicil in which he expresses his intention to limit the revocation of his will to that part through which he had drawn his pen. It is manifest therefore that the testator did not mean to revoke the previous devise of *Southwood* and *Haverhill*. [*Bayley*, J. Some argument is also to be raised in favour of your construction, from the fact that the estate in *Southwood Park* is part freehold and part copyhold. The testator could not, by the words " all my freehold property," mean to revoke the previous disposition as to the copyhold part of *Southwood*. He would probably wish the whole estate, copyhold and freehold, to go entire.] That is a strong confirmation of the construction contended for on the part of the plaintiff. It is not to be presumed that he intended to revoke the devise of the copyhold, unless it is expressly stated. [*Bayley*, J. In his will he includes in one devise the freehold and copyhold as going together, and if it is the right construction of the codicil that he meant to revoke the devise of the freehold part of *Southwood*, the copyhold would go in one line, and the freehold in another, which would be extremely inconvenient.] By his will he devises " all his freehold and copyhold farm and estate in *Southwood Park*," and unless it is contended on the other side, that the freehold and copyhold are divisible, it follows that the inconvenience pointed out by the court must arise, from holding that the codicil revokes the devise of the *Southwood* estate. [The counsel on the other side here admitted, that the copyhold and freehold at *Southwood* were one estate, and at the time of the will were in the occupation of one tenant at one entire rent.]

The second question is, whether the manor of *Marcham* passed under the residuary devise contained in the testator's will; and, if it did, was such devise revoked by the codicil? With respect to the latter part of the question, it is unnecessary to trouble the court, for if the manor of *Marcham* did pass under the residuary devise, it is immaterial whether that devise was revoked or not. But it is contended that it did not pass under the residuary devise. The terms of the residuary devise are, "and as to, for and concerning all the rest, residue, and remainder of the property of which I shall be possessed, or to which I shall be entitled at the time of my decease, or over which I have a disposing power, whether the same consist wholly or in part of estates of freehold, copyhold, or for years, money in the funds, &c., I give, &c." It may be admitted that, in all devises of the residue of personal property, the court will always incline to construe them as largely as possible, so that the whole of the personal property of which the testator died possessed may be included, and that the testator may not be considered as dying intestate as to any part of such property. But with respect to real property, the rule is different; for unless the court see clearly upon the whole of the will, that the testator meant his real estate to be included in such a devise, they will not disinherit the heir-at-law, however extensive the words of the devise may be. Another principle applicable to residuary clauses is, that a testator can only devise what real property he has at the time of making his will, and not at the time of his death, and every devise of real property, though in form it may be residuary, is in substance specific. For this *How* v. *Lord Dartmouth* (*a*), *Milner* v. *Slater* (*b*), and *Lamb* v. *Bland* (*c*) are authorities. Now, looking to the whole of the will, it must be taken that the testator meant to exclude the manor of *Marcham* from the operation of the residuary clause. It is clear that if it was intended to pass under that clause, it must have passed

(*a*) 7 Ves. jun. 147. (*b*) 8 Id. 305. (*c*) 2 Jac. & Walk. 404.

1825. DUFFIELD v. ELWES.

as a specific devise, and then this absurdity follows. The court will observe that in one part of the will the testator directs the manor of *Marcham* to be sold, and that a certain portion of the proceeds shall be held in trust "for such son of Mrs. *Duffield*, who under the trusts of a settlement now intended to be forthwith made, shall become possessed of an estate tail in the *said* manor of *Marcham*, &c." It is utterly irreconcilable and inconsistent that the testator should in one breath speak of this same manor of *Marcham*, as property in which one of his daughter's children shall be seised of an estate tail, and yet that it shall be sold and the proceeds laid out in the funds. Without going farther, this shews that there is no reasonable ground for holding that the testator intended to include this manor in the residuary clause. The testator speaks of a settlement "now intended to be forthwith made." If therefore he meant to settle the manor of *Marcham*, that settlement would be a revocation of the devise, supposing it was intended that it should pass under the residuary clause, 1 *Saund.* 278. a. He clearly did not mean to devise it if he meant to settle it. But it is sufficient here to shew that the testator's intention was not to devise it under the residuary clause, and that is manifested by the inconsistency pointed out. The testator's intention to settle the manor at the time of making the will must be taken as the key to construe the residuary clause, and as he clearly meant to settle, he cannot be supposed to make it the subject of devise. In fact, however, at the time of the will, the manor of *Marcham* had been settled, for the testator refers to the settlement made on his wife before her marriage, and by which an annuity for her life was charged on that manor, and he confirms that annuity. Now this is utterly inconsistent with the residuary clause, which directs the sale of all the property therein mentioned. [*Bayley*, J. The annuity to the wife is a temporary charge only, and the estate might be sold subject thereto.]

1825.

DUFFIELD v. ELWES.

The third question is, whether the manor of *Marcham* passes under the codicil to the first son of the plaintiff, *Emily Frances Duffield*, who shall attain twenty-one years, and change his name to *Elwes*, or to whom does the same belong? It is contended that it did not pass under the codicil, but belongs to the testator's heir at law, Mrs. *Duffield*. This question involves two others; first, whether the words in the codicil, "all my freehold property, lands, tenements, and hereditaments," were intended to operate on any other property, than that upon which the erasure in the will would have operated; and second, whether the codicil is such a republication of the will as to make it speak from the time when the codicil was executed, so as to include the manor of *Marcham* in the residuary clause. The third and fourth questions are in effect the same, the only difference between them being, that the former has reference to the manor of *Marcham* alone, whereas the latter embraces property acquired by the testator after he made his will. Unless therefore there is any distinction between lands purchased after the making of the will and before the codicil, and lands which, at the time the testator made his will, he did not intend to pass by it, the answer to the fourth question will dispose of the third. Now there is no ground for such a distinction. The testator had clearly intended to make a settlement of the *Marcham* estate; that idea was abandoned before he made his codicil, and therefore that property would form part of the residue of his estate, and stand on the same footing with after-purchased property. As the argument on the fourth question must therefore be the same as that upon the third, both may be considered together as embracing but one. It is contended then, in the fourth place, that the estates at *Withersfield* and *Haverhill*, purchased after the testator made his will, descended to the testator's heir at law. It is not denied that a codicil may be such a republication of a will as to pass estates purchased by the testator between the time of making the will and the publication of his codicil. Too many cases have been de-

1825.

DUFFIELD v. ELWES.

cided to allow now of any argument upon that point (*a*). Among those is *Stratford* v. *Bowes* (*b*); but although that case sets up the general doctrine that a codicil may be such a republication of a will as to pass after-purchased property, yet it at the same time establishes a proposition of great importance in the consideration of the present case, namely, that where a codicil can be shewn to relate only to the republication of part of a will, it will not pass after-purchased estates. Now, if in the present case the testator did not mean a general republication of his will, but only a particular part, by his codicil, then *Stratford* v. *Bowes* is an express authority for the heir at law. It is quite manifest from the codicil, that the testator meant only to revoke a particular part of his will, and then make a disposition of that property to which the part of the will revoked was applicable. He clearly did not mean to add any thing to his will, but simply to make some alteration in that disposition which he had before directed. Admitting the force of the general words of the codicil, still, according to *Buller*, J. in *Thelluson* v. *Woodford* (*c*) "slight circumstances are sufficient to qualify and restrain general words." Here it is shewn that the principal object of the codicil was to revoke only a part of the will, and not to make a general republication of it, and therefore, according to the general rule, the freehold estates now in question would descend to the testator's heir at law. But at all events if it be doubtful whether this property passed by the will or the codicil, then, according to the acknowledged rule in such cases, the heir at law is entitled to the benefit of such doubt. On the whole, therefore, it must be answered to the third and fourth questions, first, that the manor of *Marcham* did not pass under the codicil, but belongs to the heir at law; and second, that the after acquired estates at *Withersfield* and *Haverhill* descended also to the heir at law.

(*a*) See *Goodtitle* v. *Meredith*, 2 M. & S. 5, and *Hulme* v. *Heygate*, 1 Meriv. 285.

(*b*) 2 B. & P. 500.

(*c*) 4 Ves. jun. 325.

1825.

DUFFIELD *v.* ELWES.

Then, as to the fifth question, the answer to be sent must be, that the surplus rents and profits belong to the customary heir of the copyhold property, and the heir at law of the freehold property, respectively. This depends upon the nature of the devise of the *Southwood* and *Haverhill* estates to a son or daughter of Mrs. *Duffield*. The testator willed that his trustees should, by and out of the rents, issues, and profits of the said freehold and copyhold estates, by that his will first devised, and by and out of the part or share of and in the said stocks, &c. to which any child or children of the plaintiff, Mrs. *Duffield*, by the said *Thomas Duffield*, or by any after-taken husband, should be *presumptively* entitled, pay and apply for the maintenance and education of any such child or children in the mean time, and until his, her, or their share or portion, shares or portions, should become payable, such yearly sum and sums of money, as to the trustees should seem meet. Now the question, to whom do the surplus of the rents and profits of these estates in the mean time belong, involves the question, what estate the first son who attains twenty-one takes? It is contended that, under the terms of this will, this is an *executory* devise to such son of Mrs. *Duffield* as shall attain the age of twenty-one; and if so, then the surplus rents and profits must go to her as heir at law, until the estate vests, unless the residuary clause defeats that operation of the devise, which it is insisted it does not. The testator devises *Southwood Park* and *Haverhill*, "in case there should be but one son of his daughter, who should attain the age of twenty-one years, upon trust for such son, his heirs and assigns for ever, and in case there should be two or more sons, who should attain the age of twenty-one years, then in trust for the second of such sons, his heirs and assigns for ever; and in case there should be no son who should attain the age of twenty-one years, then upon trust for such of the daughters, if any, as should first attain the age of twenty-one years, &c.; but if there should not be any son who should attain twenty-one, nor any daughter who should attain that age, then upon

1825.

DUFFIELD v. ELWES.

trust, &c." Now this is clearly an executory devise, liable to be defeated upon the event of a son dying under age: besides which there was no person in esse answering the designation in the will at the time it was made. The time at which, and the person in whom the estate would vest, were both uncertain. It therefore comes precisely within the definition commonly given of an executory devise, namely, "a devise of a future interest in lands, not to take effect at the testator's death, but limited to arise and vest upon a future contingency:" *Fearne* on Contingent Remainders, 381, 4th ed. This case is perfectly distinguishable from *Boraston's* case (*a*), *Doe* v. *Moore* (*b*), *Bromfield* v. *Crowder* (*c*), *Doe* v. *Nowell* (*d*), and *Warter* v. *Hutchinson* (*e*), for in all those there was a person in esse, who answered the description given by the testator. But here the will, from its negative language throughout, shews that the testator contemplated the possibility of there being no person who would answer the description given. This construction is further strengthened by his language in a subsequent part of the will, when he speaks of a child *presumptively* entitled, which is not the language usually applied to a person to whom a vested interest is devised. This case cannot be distinguished from *Bullock* v. *Jones* (*f*). There the testator devised his real and personal estate to the first son of *A*. when he shall attain twenty-one. *A*. had no son at the date of the will or the testator's death, and it was held that as to the real estate it was a good executory devise. So this is clearly an executory devise, and if so, then the rents and profits of the estate belong to the heir at law until it vests, unless the residuary clause has the effect of controlling that rule of law: *Hopkins* v. *Hopkins* (*g*) and *Stanley* v. *Stanley* (*h*). The question then is whether the residuary clause has that effect. It clearly cannot, because by that clause every thing there devised is *to be sold* by the trustees,

(*a*) 3 Rep. 19. (*b*) 14 East, 601. (*c*) 1 N. R. 313.
(*d*) 1 M. & S. 327. (*e*) Ante, vol. iii. 58. (*f*) 2 Ves. sen. 521.
(*g*) 1 Ves. sen. 268. (*h*) 16 Ves. jun. 496.

1825.

DUFFIELD v. ELWES.

and it would be somewhat incongruous that the testator should direct the surplus rents and profits to be sold. They are therefore not included in that clause. Then, will they pass by the codicil? This being an executory devise, they cannot, unless the codicil contained the words "rest and residue," which it does not, and *Gibson* v. *Lord Montfort* (a) is an express authority on that point. The answer, therefore, to the fifth question must be, that the surplus rents and profits go to the customary heir of the copyhold, and the heir at law of the freehold.

Then, sixthly and lastly, for the same reasons which have been just urged as to the fifth question, the intermediate rents and profits of such estates as are effectually devised by the testator's codicil to the son of Mrs. *Duffield,* who shall first attain twenty-one, and take the name of *Elwes,* must go to the heir at law, until such events take place. If this be an executory devise, that consequence necessarily follows, for the same reasons that the surplus rents are to go to the heir at law. There is, perhaps, a stronger reason for so holding in the present case than in the other, for the residuary clause is in effect revoked by the codicil, under which the estate to the son is devised. It will be incumbent on the other side to shew that the intermediate rents and profits passed to the son by the residuary clause; but if the operation of the codicil is to revoke the residuary clause, then that argument must fail.

Dampier, for *G. T. W. H. Duffield,* the only son of the plaintiffs, contended, that the devise mentioned in the first question was revoked by the testator's codicil. It is clear from the codicil that the testator did not mean to die intestate as to any part of his property, but that all should go to his grandson. The words of the codicil are quite sufficient to carry that purpose into effect. It is difficult to understand for what purpose the testator introduced the words "*all* my freehold property," unless he intended that all should go to his grandson. The word "all," is quite sufficient to pass

(a) 1 Ves. sen. 491.

1825.

DUFFIELD v. ELWES.

all he had, and no sufficient ground has been suggested on the other side to satisfy the Court that less than all was intended. It is to be observed that the testator had certain special intents, one of which was that his grandson should, on attaining twenty-one, take the name of *Elwes*, and that if he did not do so, the estate was to be devested. Now, if the *Southwood* and *Haverhill* estates do not pass by the codicil, but by the will, that special intent will be defeated, for the grandson, on coming of age, may refuse to take the testator's name. He may possibly be the only grandson, and if he takes by the will, he may be entitled to some part of the testator's property, without being obliged to assume the name of *Elwes;* whereas, if he takes by the codicil, he will be entitled to no part unless he changes his name. This is sufficient to shew the unreasonableness of holding that the devise mentioned in the first question is not revoked by the codicil.

Secondly, the manor of *Marcham* did pass by the residuary clause of the will. If the argument against this proposition rested only upon the fact urged on the other side, namely, that the testator had charged the manor with an annuity to his wife, and consequently he could not mean it to be sold, it would admit of an easy answer, by saying that the vendee, whoever he might be, must take the manor subject to that annuity. But then it is said that if the manor did pass by the residuary devise, it would involve this incongruity, that the testator contemplated the existence of a grandson, who should have an estate tail in the manor, and yet at the same time devised it in his residuary clause to his trustees, to sell and convert it into money. The answer to that however is, that this devise was revoked by the codicil, and by the same instrument the manor of *Marcham* passed to the first son of Mrs. *Duffield* who shall attain the age of twenty-one, and change his name to *Elwes,* which is the third question.

In considering the third question, it is material to attend to the circumstances which had taken place between the

date of the testator's will and his codicil. In 1811 he made his will, and in 1821 he made his codicil. Ten years therefore had elapsed, and at the period when his codicil was dated, he had not made the settlement mentioned in his will, although it was originally intended to be forthwith executed. At the date of the will his daughter had no children, but when he made his codicil, she had five,—four daughters and one son. That son was then six or seven years old; he had escaped the chances and perils of infancy, and therefore the testator may be supposed to have had him more in his eye, as a person likely to live to maturity. Beside this, the testator had in the interval considerably increased the value of his estates, and had purchased other property. Under these circumstances the testator makes his codicil, which appears to have a threefold operation; first, it revokes the former residuary devise; second, it disposes of all the property not included in the will; and third, it confirms the will in all other respects. Now the codicil may be read in this way: "Whereas I have given, by my will, all but the manor of *Marcham* to be sold; I now revoke the sale of any; I desire none shall be sold, and I give all to my grandson." By the will the manor of *Marcham* is excepted; but by the codicil nothing is excepted. So that to say that *Marcham* shall not pass by the words of the codicil, is to say that a codicil without an exception at all, shall have no more effect than a will with an exception. The reason why *Marcham* was excepted from the will, was for the special purpose of settling it. That special purpose had vanished at the time the codicil was made; and therefore as the only reason for the exception had ceased, the words of the codicil must have their full effect. But beside this, it appears from the true construction of the codicil, that an argument may be deduced to shew what the testator's intention was. He begins by stating that the sole intention of the *rasure* was to revoke that part only of his will whereby he directed the sale of his freehold property. He does not say the sole intent of the *codicil* was to revoke the residuary

1825. DUFFIELD v. ELWES.

clause; but the sole intention of the *rasure* was to do that, and then a new disposition of the property is made.

Fourthly, it is contended that the estates at *Withersfield* and *Haverhill*, purchased after the testator made his will, do not go to the heir at law nor to the residuary devisee, but to the grandson under the codicil. All the circumstances shewing an intention to pass by the codicil lands excepted out of the will, also shew an intention to pass after-acquired property. It is to be observed that the revocation by the codicil is a revocation of the power of sale. The devise in the residuary clause of the will is only to sell; it is not a devise to receive the rents and profits and lay them out, but immediately to sell, and no more. Then having revoked the power of sale by his codicil, it is the same thing as if the testator had revoked the devise. If then he has revoked the devise to the trustees, the grandson will take the whole estate by the codicil. If he has not revoked the devise, but only the trust, then the grandson will take an equitable interest under the codicil, and the trustees under the will take the legal fee, subject to the equitable estate of the grandson, and in that case the whole devise is revoked. The residuary clause may be read as if no mention of freeholds was made in it; if so, the codicil cannot make it by republication pass after-purchased estates. Such estates must pass to the grandson by force of the general words, "*all* my freehold lands, tenements, and hereditaments." Nothing is to be found which at all restrains the operation of these general words, and the Court may give full effect to them without doing violence to any part of the will, ratified and confirmed as it is by the codicil. The case of *Strathmore* v. *Bowes* is exceedingly similar to this, except in one point which distinguishes it from the present,—a point upon which the decision there hinged but which is not to be found here. There the codicil contained words of reference which explained the testator's meaning. He devised all his freehold and copyhold manors, messuages, tenements, and hereditaments whatsoever in trust; and after

having purchased other lands, he made a codicil reciting that he had devised all his freehold and copyhold manors, &c. as in the will, and then revoked the devise in trust, as far as related to some of the trustees, and then proceeded: " I do hereby give and devise my *said* lands, &c. and do hereby make and declare this codicil to be part of my last will;" and the Court held that the after-purchased property did not pass.

The fifth and sixth questions must be decided on similar grounds respectively, but as the sixth is the most simple, it is desireable to take that first. The question is, whether the devise is of a vested or contingent interest. Now all the cases from *Borraston's* down to *Warter* v. *Hutchinson*, shew that words seemingly of condition precedent, may be, by the intention of the testator appearing in his will, words of condition subsequent, such as may affect the possession, but not the interest in the property devised. This is shewn by the cases of *Trodd* v. *Downes* (a), *Bromfield* v. *Crowder*, and *Doe* v. *Moore*. It is true that in these cases there are persons designated to take, but *Doe* v. *Nowell*, and *Driver* v. *Frank* (b), are authorities to shew that there need not be persona designata. In those cases the persons who took a vested interest were not in existence at the time of the death of the testator. In *Driver* v. *Frank* it was said by *Dampier*, J. " It has always been an object with courts of law and equity to vest interests as soon as the words of the instrument will admit of it. The words *from and immediately after*, point out the time when the party shall come into possession, and whether the devise be immediate or in remainder makes no real distinction." The case of *Bullock* v. *Stones* (c), cited on the other side, is an authority strongly in favour of the plaintiff's son, rather than against him, for that case goes only so far as this, that " till a grandson is born" the rents and profits go to the heir at law, but the moment a grandson is born, he takes them. In

(a) 2 Atk. 204. (b) 3 M. & S. 25. (c) 2 Ves. sen. 521.

1825.

DUFFIELD v. ELWES.

the case of *Stanley* v. *Stanley* (*a*), it was held that the person did take a vested interest from the moment of his birth, and therefore the conveyance of the estate, which the Lord Chancellor there mentions, does not at all shew that the party had not an immediate interest. His lordship only says, that the possession might be suspended, but the want of possession is distinguished from the interest. If indeed no grandson had been born in this case, it must be admitted, according to the doctrine in *Hopkins* v. *Hopkins* (*b*), that the heir at law would be entitled to the rents and profits. But if the eldest grandson does not take a vested interest in this property, there may happen to be this inconvenience arising, namely, that if he were to marry and have issue, and die before attaining the age of twenty-one; his issue could not take, and the property would go over to a second grandson, and, consequently, the testator's heir at law would take nothing. This event actually happened in *Dean* v. *Bagshaw* (*c*), where, however, the words of the will were extremely special.

The fifth question is, in effect, the same as the sixth, for if the property, which is the subject of the latter question, will become a vested interest in possession as soon as the grandson attains twenty-one, the property mentioned in the fifth question will go in the same way, and cannot be affected by the substitution of a second grandson for a first, because the event which is to determine one estate can never have any effect upon an event which is to vest the other estate. To effect this there must be a totally independent clause. When property is to go, not to the heir at law, but to the hæres factus, the mere substitution of the hæres natus will not hinder the estate from vesting in the former. If the estate is devested out of one and given to another, each takes during his interest and title. *Co. Lit.* 11. b. *n.* 4. *Harg.* ed.

Patteson, for the four infant daughters of the plaintiffs.

(*a*) 16 Ves. sen. 496. (*b*) 1 Ves. sen. 286.
(*c*) 6 T. R. 512. See *Doe* v. *Scudamore*, 2 B. & P. 289.

These infants are in no degree interested in the determination of the first question. If they take any thing it is under the residuary clause, and therefore it is argued, on their behalf, upon the second question, that the manor of *Marcham* did pass under that clause. The absurdity pointed out by Mr. *Tindal*, if it did not, does not necessarily follow. It is true that the devise in the residuary clause was revoked by the codicil. No doubt can be entertained that the testator originally meant to settle the manor of *Marcham*, and it is equally clear that he did not mean to die intestate as to any part of his property. If that be so, then it must be taken that he meant that manor to pass under the residuary clause, in the event of his not making a settlement of it, which he never did. The residuary clause would at all events have that effect in point of law, unless it can be supposed (for which there is no ground) that he meant to die intestate as to that manor. Then as that must be the effect of the residuary clause, the testator makes his codicil, whereby he revokes the power of sale given to his trustees in the residuary clause, and makes a fresh disposition in favour of his grandson. No settlement of *Marcham* having been made, it is more than probable that the testator meant the property devised by the codicil to his grandson to be an equivalent for the 50,000*l.* three per cents. which he had intended should go to him, as arising from the sale of the property mentioned in the residuary clause. This is a solution of the difficulty upon that part of the codicil, which revokes the former devise, through which the testator struck his pen, and shews that the codicil was intended to pass that property alone as to which the former devise had been revoked. Hence it follows that the manor of *Marcham* did pass by the codicil, which must be the answer sent to the third question.

Then as to the fourth question, it must be answered by saying, that the after-acquired estates of *Withersfield* and *Haverill* passed by the will, and not by the codicil. The codicil altogether confirms the will, with the exception of

1825.

DUFFIELD v. ELWES.

that part whereby the testator directs the sale of his freehold property. That part only is revoked. Such revocation could not operate upon the after-purchased estates, for at the date of the will it could not have a prospective operation upon estates of which he was not then possessed. The case of *Goodtitle* v. *Meredith* (*a*) is an authority for this, and therefore those estates, if they pass at all, must pass by the will and not by the codicil.

The plaintiff's daughters are more materially interested in the fifth and sixth, than in any of the other questions. If it be admitted that the devise to the grandson is *executory*, then it is clear that the surplus and the intermediate rents and profits must either go to the heir-at-law, or pass under the residuary clause. The words of that clause are amply sufficient to carry those rents and profits. The expressions are "all the rest, residue, and remainder of the property of which I shall be possessed, or to which I shall be entitled at the time of my decease, *or over which I shall have a disposing power*, &c." Those words are comprehensive enough to entitle the persons claiming under the residuary clause to take the surplus and intermediate rents and profits. It cannot be denied that the testator had power to dispose of these rents, if he thought fit, and if the words are sufficient to pass them, the onus lies on the heir-at-law to shew that the testator had a different intention. Upon the question whether the devise to the grandson was executory or not, no additional argument need be offered. It is sufficient to say, that in every case from the decision in *Boraston's* case down to *Warter* v. *Hutchinson*, where the devise has been held to give a vested interest, the party in whom it vested was expressly designated, or pointed out, and that he answered the designation or description. The main distinction between this case and those, is, that in this there is no persona designata. Here the grandson was not named, nor can he answer the whole description until he attains the age of twenty-one and takes the name of *Elwes* (*b*).

(*a*) 2 M. & S. 5. (*b*) See Fearne, 149. 3d Ed.

The fact that the grandson was living at the date of the codicil does not help him, for if the testator meant him to be the peculiar object of his bounty he would have described him by name. He does not, and therefore the case does not, fall within the rule applicable to a case where there is persona designata.

1825. DUFFIELD v. ELWES.

Cur. adv. vult (*a*).

The following certificate was afterwards sent by the judges:

This case has been argued before us by counsel. We have considered it and are of opinion,

1st. That the devise of the freehold part of the estate at *Southwood Park*, and of the freehold farm and estate at *Haverhill*, contained in the will, is not revoked by the codicil.

2dly. That the manor of *Marcham* did pass under the residuary devise contained in the testator's will, and that such devise was revoked by the codicil.

3dly. That the manor of *Marcham* did pass under the codicil to the first son of the plaintiff *Emily Frances Duffield* who shall attain twenty-one years and change his name to *Elwes*.

4thly. That the estate at *Withersfield* and *Haverhill*, purchased after the testator made his will, passed under the devise in the codicil to the first son of the plaintiff *Emily Frances Duffield* who shall attain twenty-one years and change his name to *Elwes*.

5thly. That the surplus rents and profits of the said copyhold estates at *Southwood Park*, and of the said freehold estate at the same place, and of the said freehold farm and estate at *Haverhill*, after providing for the maintenance of the devisee thereof, belong to *Abraham Henry Chambers*, the surviving trustee under the will of the testator, until the first son of the said plaintiff *Emily Frances Duffield* shall attain twenty-one years, or in failure of such son till a

(*a*) This case was argued at the sittings after last Easter Term.

1825.

DUFFIELD v. ELWES.

daughter shall attain that age or be married with consent according to the will.

6thly. That the intermediate rents and profits of such of the testator's freehold estates as are effectually devised by his codicil to the son of the plaintiff *Emily Frances Duffield*, who shall first attain twenty-one years and change his name to *Elwes*, until such events take place, belong to *Abraham Henry Chambers*, the surviving trustee under the will of the testator.

J. BAYLEY.
G. S. HOLROYD.
J. LITTLEDALE.

END OF HILARY TERM.

INDEX

TO THE

PRINCIPAL MATTERS.

ABANDONMENT.

See Ancient Lights.—Ship, 1.

ABUSE OF PROCESS.

See Outlawry, 1.

ACCORD AND SATISFACTION.

A. and *B*, are respectively indebted to *C.*, and *B.* is also indebted to *A.*; *C.* agrees with *B.* to transfer *A.*'s debt to his (*B.*'s) account, which he does by charging in an account delivered, the sum due to him from *A.*:—Held, that by this arrangement *A.*'s liability to pay *C.* was not discharged. *Cuxon* v. *Chadley*, 5 *G.* 4. *Page* 417

ACTION.

See Annuity.—Apothecaries.—Assumpsit.—Bankrupt.—Bill of Exchange.—Case.—Conveyancer.—Covenant.—Devise.—Estoppel.—Growing Crops.—Husband and Wife.—Insurance.—Partners.—Pleading.—Promissory Note.—Ship.—Slander.—Trover.—Usury.

ACTIONABLE WORDS.

See Slander, 1.

ADVERSE POSSESSION.

See Ejectment, 1.

AFFIDAVIT.

See Outlawry, 2.

AGREEMENT.

See Evidence, 2, 3.—Freight.

ALE-HOUSES.

See Mandamus, 1.

By the 26 *Geo.* 2. c. 31. s. 4. no ale license shall be granted but on the 1st *September* yearly, or within twenty days after, and by s. 16. ale-houses in cities and towns corporate are excepted; but by 3 *G.* 4. c. 77. s. 7. all general annual meetings for granting licenses, as well in

cities and towns corporate as in all other places in *England*, shall be held in the month of *September* yearly:—Held, that the effect of this clause was not to repeal the general provision of the former statute, but to extend its operation to cities and towns corporate only. *Rex* v. *The Justices of Surry*, 5 *G*.4. *Page* 308

ANCIENT LIGHTS.

A right to light is acquired by mere user, and may be forfeited by non-user, though for less than twenty years; unless an intention is manifested, when the non-user commences, to resume the right within a reasonable time. *Moore* v. *Rawson*, 5 & 6 *G*. 4. 234

ANNUITY.

See Covenant, 2.

By an annuity deed reciting that *C*. had devised lands to *A*. and *B*. in settlement, with remainder over to *D*. in default of their issue male, *A*. and *B*., in regard that *C*. had made no other provision for *D*., and in consideration of their esteem for him, agreed with *D*., his executors and administrators, to pay him an annuity of 500*l*., for twenty-one years, if they, or the survivor of them, should so long live; and in case of the death of *D*. during the term, to his child or children (if any) in such proportion as he should appoint, and in default of such appointment, to all his children equally; and if he should leave no child, to his wife, as long as she should continue his widow. *D*. agreed with *A*. and *B*., their executors and administrators, that in case he or his heirs should come into possession of the lands under the will of *C*., then *D*., his heirs, executors, or administrators, would repay to *A*. and *B*., or the survivor of them, their and his executors or administrators, all sums of money received by him, his children, or wife, for, or on account of the annuity. *D*., his wife, and only child, all died during the term:—Held, in debt by the administrator of *D*. and his child, that the deed was not an absolute grant of an annuity for twenty-one years, but was determinable by the death of *D*., his child, and wife, and therefore that the plaintiff could not recover the arrears of the annuity in respect of either of his intestates. *Barford* v. *Stuckey*. 5 *G*. 4. *Page* 118

APOTHECARIES.

An apothecary is not bound by statute 55 *G*. 3. c. 194. to prove the handwriting of every member of the court of examiners of the apothecaries' company, who may have subscribed his certificate. Therefore, where the plaintiff, in an action for his bill, produced a certificate, purporting to be granted by the court of examiners, and having twelve signatures, purporting to be the signatures of its members, and proved one of the signatures, and gave general evidence to shew that the certificate was genuine, and that he obtained

ATTACHMENT.

Attachment ordered against the mayor of a corporation for not making a return to a peremptory mandamus, within the time prescribed by the writ, though there was no personal service thereof. *Rex* v. *Fowey*, 5 & 6 *G*. 4. 614

ATTORNEY.

See Lien. — Outlawry, 2. — Practice, 2.—Trover.

1. Where an attorney, without any corrupt or improper motives, prepared a special case, in order to take the opinion of the Court upon the will of a testator, and suggested several facts which had no foundation:—Held, that he was guilty of a contempt, and he was fined in 30*l*. for his offence. *In Re Elsam*, 5 *G*. 4. 389

2. The two terms allowed by the rule of Court, *H. T.* 26 *G*. 3. for charging a prisoner in execution, must be computed from the date of the notice of surrender. Therefore, in case against an attorney for negligence, where plaintiff had recovered a judgment against *A*. who surrendered in discharge of his bail on the day before the essoin day of *E.T.*, gave notice thereof two days afterwards, and, not being charged in execution during *E. T.*, was discharged in *T. T.*:—Held, that the action was not maintainable; first, because *A*. was improperly discharged; and, second, because the meaning of the rule of Court is doubtful. *Laidler* v. *Elliott* 5 & 6 *G*. 4. 635

3. Where the attorney of the vendee of an estate was employed to investigate the title thereto, and in taking the opinion of counsel thereon, omitted to state in the case, certain deeds materially affecting the title, and upon the faith of the opinion given (which would have been different had all the deeds been stated) the vendee concluded the purchase, but was afterwards dammified by finding that the title was imperfect:—Held, that the attorney was liable to him in an action for negligence. *Ireson* v. *Pearman*, 5 & 6 *G*. 4. 687

AUTREFOIS ACQUIT.

See Indictment.

AWARD.

See Arbitrator.—Costs, 1.

BAIL.

See Bankrupt, 2.—Costs, 1.—Outlawry, 1.—Pleading, 1.—Practice, 3.

1. Generally speaking, the Court will relieve the bail, wherever the defendant is entitled to his discharge. *Todd* v. *Maxfield*, 5 *G*. 4. 258

2. Where a defendant obtained his certificate under a commission of bankrupt before the trial, but did not plead it puis darrein continuance, the Court ordered an exnoeretur to be entered on the bail-piece. *Id.* *ib.*

BANKRUPT.

See Bail, 2. — Bill of Exchange, 3.—Composition, 2. — Landlord and Tenant, 3. — Pleading, 1.— Usury, 2.

1. By a private act of parliament,

entitled "An Act to enable the *Norwich* Union Society to *sue* in the name of their secretary, and to be sued in the names of their directors, treasurers, and secretary," that society were empowered to commence and prosecute all *actions* and *suits* in the name of their secretary as a nominal plaintiff:—Held, that that did not empower the secretary to sue out a commission of bankrupt on the behalf of the society, against a person indebted to them as a society. *Guthrie* v. *Fisk*, 5 *G*. 4. 24

2. Where a defendant had been three times declared a bankrupt, and had not paid fifteen shillings in the pound under the second commission, the Court held that the third commission was not void on that account, but voidable only. *Todd* v. *Maxfield*, 5 *G*. 4. 258

3. *B.*, a manufacturer in *Staffordshire*, makes goods to the order of *A.*, a merchant in *London*, and forwards them thither, having previously committed an act of bankruptcy. Before the shipment, but after the act of bankruptcy, *B.* draws upon *A.* a bill of exchange, exceeding in amount the price of the goods, which *A.*, being ignorant of the act of bankruptcy, accepts. The goods having got into the possession of *A.*, and *B.* being declared a bankrupt:—Held, that the property in the goods never passed to *A.*; that his acceptance of the bill was not a payment "by a debtor of the bankrupt," within the meaning of the 1 *G*. 1. c. 15. s. 14; and, consequently, that the assignees of *B.* might maintain trover against *A.* for the goods. *Bishop* v. *Crawshay*, 5 *G*. 4. 279

BENEFIT SOCIETIES.

See Justices, 5.

BILL OF EXCHANGE.

See Bankrupt, 3.—Composition, 2.

1. *A.* drew bills of exchange in favour of *B.* in *India*, upon the *E. I. Co.* in *London*, which the latter accepted. *C.*, as the agent of *B.*, indorsed the bills to *D.* and *E.*, under the supposed authority of a power of attorney from *B.*, which the *E. I. Co.* had inspected. *D.* and *E.* indorsed the bills to their bankers and agents *F.* and Co., with instructions to present them for payment when due. *F.* and Co. indorsed the bills, presented them for payment when due, received the money, and paid it over to their principals *D.* and *E.* The power of attorney from *B.* did not authorize *C.* to indorse the bills, and *B.* having died, his administrator recovered the amount of them from the *E. I. Co.*, as the acceptors. The latter now brought assumpsit against *F.* and Co. upon an alleged undertaking by them that they were entitled to receive payment of the bills. The jury found, specially, that the plaintiffs paid the bills not on the faith of the indorsement by the defendants, but on the faith of the power of attorney, and that the defendants received the money as agents, and paid it over to their principals before they knew that the first indorsement by *C.* was unauthorized:

—Held, that the action could not be maintained against these defendants. *Semble*, that a subsequent indorsement of a bill by a holder does not imply a warranty by him that the former indorsement is genuine. *The East India Company* v. *Tritton*, 5 G. 4. Page 214

2. Where a bill broker discounted a bill of exchange for a stranger, upon being merely satisfied with the goodness of the acceptance, without asking his name or any other question, and it turned out that the bill had been stolen:—Held, in an action by the broker against the acceptor, that it was for the jury to say whether the plaintiff had taken the bill under circumstances which ought to have excited the suspicion of a prudent and careful man; and the jury having found for the defendant, the Court refused to set aside the verdict. *Gill* v. *Cubitt*, 5 G. 4. 324

3. *A.*, residing at *New York*, having ordered goods of *B.*, residing at *Birmingham*, sent to *B.* on account of the goods a bill drawn by *C.* in *New York*, upon *D.* in *London*, payable to the order of *B.*, but not indorsed by *A.* *B.*, through his bankers, presented the bill for acceptance to *D.*, who refused to accept, but no notice of the non-acceptance was given until the day of payment, when the bill was presented for payment and dishonoured. *C.*, the drawer, became bankrupt before the bill reached *B.*'s hands, and *never* had any funds in the hands of *D.*, the drawee, to meet the bill. In assumpsit by *B.* against his bankers for neglecting to give notice of the non-acceptance:—Held, that *A.* not having indorsed the bill, was not entitled to notice of dishonour, and remained liable to *B.* for the amount of the goods; that *C.*, the drawer, never having had any funds in the hands of *D.*, the drawee, was likewise not entitled to notice; and, therefore, that *B.* could not recover the full amount of the bill, but only such damages as he had sustained by being delayed in pursuit of his remedy against the drawer. *Van Wart* v. *Woolley*, 5 G. 4. 374

4. A bill of exchange bearing, among others, the *supposed* indorsement of *H.* and Co. bankers at *Manchester*, was presented for payment in *London*, where it was made payable by the acceptor, and dishonoured. At the request of the notary who presented the bill, plaintiff, the *London* correspondents of *H.* and Co., took up the bill for their honour, but struck out all the indorsements subsequent to that of *H.* and Co., and the money was paid to defendant, the holder of the bill. The same morning plaintiff, having discovered that the signatures of the drawer, the acceptor, and *H.* and Co., to the bill, were forgeries, sent notice thereof to defendant, and demanded the money back; and that notice was sent so early, that notice of the dishonour might have been sent to the indorsers by the same day's post. In assumpsit for the amount of the bill;—Held, that the erasure of the indorsements did not deprive defendant of his remedy against the prior indorsers, and that plaintiff, having

paid the money in mistake, was entitled to recover it back from defendant. *Wilkinson* v. *Johnston*, 5 G. 4. *Page* 403

BILL OF SALE.

See Promissory Note.

BLACK ACT.

See Hundred.

BOROUGH.

See Corporation.—Mandamus, 3. 6.

BROKER.

See Joint Stock Companies, 1.

BUBBLE ACT.

See Joint Stock Companies.

A scheme for raising money by small subscriptions, which are to be laid out at interest for the benefit of the subscribers by survivorship, the subscribers to be governed by rules and regulations to be made by the directors, and at the end of a year transferable shares to be issued, is not within the prohibitions of 6 G. 1. c. 18. ss. 17 & 18. *Nockells* v. *Crosby*, 5 & 6 G. 4. 751

CARRIER.

Where the agent of a mercantile house sent bank-notes, by a common carrier, to his principals, and the parcel was lost:—Held, that the carrier was not liable, the principals being aware (though the agent was not) that the carrier had previously given public notice of non-liability for such property. *Mayhew* v. *Eames*, 5 & 6 G. 4. 484

CASE.

See Ancient Lights.—Attorney, 2.—Fraudulent Representation.—Pleading, 2.—Slander.—Tithes.

Where plaintiff marked his goods "*Sykes*. Patent.," to shew that they were his own manufacture; and defendant copied the mark on *his* goods, to shew that they were plaintiff's manufacture, and sold the goods so marked as and for plaintiff's manufacture:—Held, that case would lie for the injury, though plaintiff and defendant were both named *Sykes*, and neither of them in fact had a valid patent. *Sykes* v. *Sykes*, 5 G. 4. 292

CERTIFICATE.

See Bail, 2.—Conveyancer.

CERTIORARI.

1. Certiorari lies to remove an ejectment from an inferior jurisdiction, at the instance of the defendant, on an affidavit that he cannot have a fair and impartial trial below, although the lease on which the ejectment was founded was executed on the premises within the local jurisdiction. *Patterson* v. *Eades*, 5 G. 4. 445
2. Certiorari does not lie to remove the appointment of a surveyor under the general highway act, 13 G. 3. c. 78. s. 80. The remedy to the party aggrieved by the appointment, is by appeal to the quarter sessions. *Rex* v. *St. Alban's*, 5 & 6 G. 4. 538
3. The stat. 30 G. 2. c. 24: s. 20. takes away the writ of certiorari;

but where counts on that statute were joined with counts for a conspiracy, at common law, to obtain goods by false pretences:—Held, that the certiorari was not taken away. *Rex* v. *Saunders*, 5 & 6 *G.* 4. *Page* 617

CHARTER.

See Corporation.—Justices, 3.—Mandamus, 3. 6.

CHARTER-PARTY.

See Freight, 1, 2.—Ship.

The owner of a *British* ship may avail himself of a statement of average made at the port of delivery in a foreign country, according to the law thereof, so as to charge a *British* freighter of goods, under a charter made in *Britain*, with the expenses of *wages and provisions for the seamen*, incurred during the necessary detention of the ship at an intermediate port, although by the law of this country such expenses would not be recoverable as average. *Dalglcish* v. *Davidson*, 5 *G.* 4. 6

CHURCHWARDENS AND OVERSEERS.

See Mandamus, 7.—Poor's Rate, 2.—Settlement by Apprenticeship, 2.

CLERK OF THE PEACE.

See Mandamus, 2.

CODICIL.

See Devise, 4.

COMMITMENT.

See Justices, 1.

COMPOSITION.

1. The tenant of leasehold premises by deed assigned his interest to trustees for the benefit of his creditors, with a proviso "that if all and every the creditors should *refuse* to execute or otherwise consent to the deed, within six months from the date thereof, it should be void;" some of the creditors did not execute the deed, but there was no evidence of their refusing to do so:—Held, that such non-execution was not a refusal within the meaning of the proviso, and did not make the deed void. *Holmes* v. *Tucker*, 5 *G.* 4. 56

2. *A.*, an agent, held funds belonging to *B.*, his principal, but had accepted bills drawn by *B.* to the full amount of them. *B.* paid away the bills to his creditors, who, to relieve *A.* from liability, and without the knowledge of *B.*, accepted from *A.* a composition of 10*s.* in the pound, and gave him up the bills; *A.* then holding funds belonging to *B.* to the full amount of the bills. *B.* afterwards became bankrupt, and his assignees brought assumpsit for money had and received against *A.* for the difference between the amount of the bills and the composition:—Held, that as *B.* had been benefited to the full amount of the bills, the payment of the composition was, as between him and *A.*, a full payment of the bills, and, therefore, that the action was not maintainable. *Stonehouse* v. *Read*, 5 & 6 *G.* 4. 603

CONSPIRACY.

See Certiorari, 3.

CONTEMPT OF COURT.

See ATTACHMENT.—ATTORNEY, 1.

CONTINUANCES.

See PUIS DARREIN CONTINUANCE.

CONTRACT.

See FRAUDS, STATUTE OF.—FRAUDULENT REPRESENTATION.—FREIGHT, 1, 2.—GROWING CROPS.—HUSBAND AND WIFE, 2.—LANDLORD AND TENANT, 1, 2.—SUNDAY.—USURY.

CONVEYANCER.

A certificated conveyancer may maintain an action for his fees. *Poucher* v. *Norman*, 5 & 6 *G.* 4. Page 648

CONVICTION.

See APPEAL.—JUSTICES, 1.—MANDAMUS, 5.

CORPORATION.

See ATTACHMENT.—JOINT STOCK COMPANIES, 1.—JUSTICES, 3.—MANDAMUS, 3. 6.

Where the charter of a corporation declared, "that it shall be lawful for the mayor and capital burgesses to remove any of their body for non-residence within the borough:"—Held, that this gave them a discretionary, and not a compulsory, power of amotion. *Rex* v. *West Looe*, 5 *G.* 4. 414

COSTS.

See COVENANT, 3.—COURT OF REQUESTS, 1.—JUSTICES OF PEACE, 1.—LIEN.—PRACTICE, 2, 3.

1. Defendant, having been held to bail for 38*l.*, paid 2*l.* into Court, which plaintiff did not take out, but before the cause was called on for trial, it was agreed to refer the cause and all matters in difference to an arbitrator, with power to him to examine the parties on oath, and call for books, &c.: the costs of the cause to abide the event; and the arbitrator having awarded only 1*l.* 19*s.* in addition to the 2*l.* paid into Court:—Held, that defendant was entitled to his costs, under 43 *G.* 3. c. 46. s. 3. *Keene* v. *Deeble*, 5 *G.* 4. 383

2. Where a judge at the assizes refused to try an indictment for a misdemeanour, manifestly bad on the face of it, but did not order it to be quashed, and the prosecutor preferred another indictment for the same offence, and removed it into *K. B.*, the Court would not call upon the prosecutor to pay the costs of the first prosecution, before he proceeded with the second. *Rex* v. *Tremaine*, 5 *G.* 4. 413

COUNTY COURT.

See INFERIOR COURT.

COURT BARON.

See MANDAMUS, 4.—PLEADING, 5.

COURT OF REQUESTS.

1. Where plaintiff sued defendants in a superior court for a demand above 5*l.*, and upon judgment by default the jury reduced the damages to 5*l.*, and it appeared that the defendants, at the time of action brought, resided within the jurisdiction of the *London* Court of Requests, and might have been sued under the 39 & 40 *G.* 3. c. 104; the Court

stayed the proceeding upon payment of the damages, without costs. *Fleming* v. *Davis*, 5 *G*. 4. *Page* 371

2. A coal merchant, residing and carrying on his business at *Lambeth*, in *Surrey*, but keeping a counting-house in the city of *London* for the purpose of receiving orders, is not entitled to the privilege of being sued only in the *London* Court of Requests, as a person seeking his livelihood in that city. *Kemsett* v. *West*, 5 & 6 *G*. 4. 626

COURT ROLLS.

See MANDAMUS, 4.

COVENANT.

See EJECTMENT, 1.—LANDLORD AND TENANT, 1, 2, 3.——PLEADING, 3.

1. Though a covenant be joint in its terms, yet if the interests of the covenanters be several, each may sue separately for a breach. *Withers* v. *Bircham*, 5 *G*. 4. 106

2. One of three joint covenantees for the payment of an annuity to *A*., cannot sue the executors of *B*., the covenantor, upon a simple averment that the other covenantees did not at any time seal or deliver the indenture; for non constat but they may still execute the deed; and joint covenantees who *may* sue, *must* sue jointly, unless they have expressly disclaimed the covenant, which it lies upon the party suing to shew. *Petrie* v. *Bury*, 5 *G*. 4. 152

3. Where the assignee of an underlease containing a covenant to repair, suffered the premises to go out of repair, and the original lessor brought an action against the original lessee for the breach of a similar covenant contained in his lease:—Held, that the damages and costs of that action, and also the costs of defending it, might be recovered as special damages in an action against the under-tenant for a breach of his covenant to repair. *Neale* v. *Wyllie*, 5 *G*. 4. 442

CUSTOM.

See INFERIOR COURT, 2.

DAMAGES.

See BILL OF EXCHANGE, 3.——COSTS, 1.——COURT OF REQUESTS, 1.—COVENANT, 3.—GROWING CROPS.—JUSTICES, 1.—LIEN.—WRIT OF INQUIRY, 1.

DEBT.

See ANNUITY.—DEVISE, 1.—HUNDRED.—INFERIOR COURT, 2.—OVERSEERS, 3.

DEBTOR AND CREDITOR.

See ASSIGNMENT OF DEBT.

DECEIT.

See FRAUDULENT REPRESENTATION.

DECLARATION.

See PARTNERS.—PLEADING, 1, 2.—PRACTICE, 6. 7. 8.——USURY, 3.—VARIANCE.

DEDICATION.

See HIGHWAY.

DEED.

See ANNUITY.—COMPOSITION DEED, 1.—COVENANT, 2.—

Devise, 1.—Feoffment.—Landlord and Tenant, 1, 2. 5.—Lord of Manor.—Promissory Note.—Trover.—Usury, 2.

DEMERARA.

See Policy of Insurance, 2.

DEMURRER.

See Annuity.—Husband and Wife.—Indictment.—Libel.—Pleading, 3. 5.—Practice, 4.

DEVISE.

See Ejectment, 1.

1. *A.* died seised of lands in fee simple, which were at that time in the possession of a tenant from year to year, and by her will devised them to *B.*, leaving *C.* her heir at law. *C.* died without ever having received any esplees, or ever having made any entry. *D.*, his son and heir at law, recovered the lands in ejectment, on the ground that they did not pass by the devise from *A.* to *B.*:—Held, that the estate was assets in *D.'s* hands, by descent from his father, and liable to the payment of a bond given by his father in his lifetime. *Bushby* v. *Dixon*, 5 *G.* 4. *Page* 126

2. By indentures of lease and release, dated in 1796, an estate was conveyed to *A.* and *B.* to the use of *A.* his heirs and assigns for ever. *A.* devised the estate to his daughter and to the heirs of her body, but in case she died without issue of her body at her decease, then to his nephew and his heirs for ever. In *February*, 1814, the daughter suffered a recovery of the estate, and upon her marriage, in *March* in the same year, executed deeds of lease and release, reciting that she was seised in fee simple of the estate, and conveyed the same to trustees in trust for her and her husband and their issue, and in default of issue to such person as she should appoint. The marriage took place, and the daughter died without issue, having devised the estate in fee to her husband, who survived her:—Held, that the recovery suffered by the daughter was inoperative, because at that time the *legal* estate for life was in *B.*, and she was only *equitable* tenant for life with a legal remainder in tail, and, consequently, that her husband had no title. *Ireson* v. *Pearman*, 5 & 6 *G.* 4. 687

3. Where a testator by his will charged all his real and personal estate with the payment of his debts, and then devised all his real and personal estate to his wife, for her life, or so long as she should remain his widow; and then directed that all his real and personal estate should be divided according to the statute of distribution, *in that case made and provided*:—Held, that by this will there was not any devise to any person of his real estate, after the death, or marriage, of his widow. *Thomas* v. *Thomas*, 5 & 6 *G.* 4. 700

4. Testator having, by voluntary settlement, conveyed his manor of *M.* to trustees, in trust to secure the payment of an annuity to his wife for life, and subject thereto, to the use of himself in fee, by his will confirmed that

settlement, and having then an only daughter, devised his freehold and copyhold estate in *S.* and his freehold estate at *H.* to trustees, in trust for the children of his daughter by her then husband, under certain limitations. By the residuary clause, he devised all the residue of his freehold and copyhold estates, money in the funds, &c. to the same trustees, upon trust, to sell and convert the same into money, and set apart 50,000*l.* 3*l.* per cent. consols, for such son of his daughter, who, under the trusts of a settlement *then intended to be forthwith made,* should become possessed of an estate tail in the manor of *M.*, and the residue to be divided among the other children of his daughter. At the date of the will, testator's daughter had no children. Some time after making this will, the testator drew a line across the direction to sell the property devised by the residuary clause. After so doing he purchased a considerable freehold estate in *W.* and *H.* By a codicil to his will, made ten years subsequently, after reciting the rasure before mentioned, and that he was apprehensive that such rasure, not being witnessed, might lead to litigation, he declared that the sole intention of such rasure was to revoke that part only of the will whereby he directed the sale of his freehold property, and then proceeded, "And I do hereby direct and appoint that the son lawfully begotten of my daughter, Mrs. *D.*, who shall first attain the age of twenty-one years, shall, on attaining such age, change his name for that of *E.;* and I give and devise to the said son of my daughter, on his attaining the age of twenty-one years, and changing his name to *E.*, *all my freehold property, lands, tenements, and hereditaments, to have and to hold to him, his heirs and assigns for ever.*" By the same codicil he ratified and confirmed the afore-mentioned will, except as before excepted. Testator died without again altering his will or codicil, and without making any settlement, stated in the residuary clause to be then in immediate contemplation, leaving his widow and daughter him surviving. At the death of the testator Mr. and Mrs. *D.* had, and now have, one infant son and four infant daughters. A case being sent from Chancery, this Court held,

1. That the devise of the freehold part of the estate at *S.* and of the freehold farm and estate at *H.*, contained in the will, was not revoked by the codicil.
2. That the manor of *M.* did pass under the residuary devise contained in the will, and that such devise was revoked by the codicil.
3. That the manor of *M.* did pass under the codicil to the first son of Mrs. *D.* who shall attain twenty-one years and change his name to *E.*
4. That the estate at *W.* and *H.* purchased after the testator made his will, passed, under the devise in the codicil, to the first son of Mrs. *D.* who shall attain twenty-one years, and change his name to *E.*
5. That the surplus rents and

profits of the copyhold estates at *S.* and of the freehold estates at the same place, and of the freehold farm and estate at *H.*, after providing for the maintenance of the devisee thereof, belong to the surviving trustee under the will, until a first son of Mrs. *D.* shall attain twenty-one years, &c.: and

6. That the intermediate rents and profits of such of the testator's freehold estates as are effectually devised by the codicil to Mrs. *D.*'s son, who shall first attain twenty-one years, and change his name to *E.*, until such events take place, belong to the surviving trustee. *Duffield* v. *Elwes*, 5 & 6 *G.* 4. *Page* 764

DISTRESS.

See Justices, 2.——Landlord and Tenant, 5.—Practice, 7.

DISTRIBUTION, STATUTE OF.

See Devise, 3.

DIVORCE.

See Husband and Wife, 1.

EJECTMENT.

See Certiorari, 1. — Landlord and Tenant, 4.— Practice, 7, 8.

1. *M. M.* seised in fee of an undivided moiety of an estate, by her will, made many years before her death, devised the same to her nephew and two nieces, as tenants in common. One of her nieces having died in her lifetime leaving an infant daughter, *M. M.* by another will, but which she never executed, devised the estate to her nephew, her surviving niece and that infant. Upon the death of *M. M.* her nephew and surviving niece by deed covenanted to carry her unexecuted will into effect, and to convey one-third of the estate to a trustee, to convey to the infant when she reached twenty-one, or to her issue if she died before twenty-one leaving any, or otherwise to themselves again: but no conveyance was ever executed in pursuance of the deed. The infant died under age and without issue, but the rents were received by her trustee for her use during her life. In ejectment by the devisee of the nephew, brought above twenty years after the death of the nephew, but within twenty years after the death of the infant:—Held, that the adverse possession began only after the latter event, and therefore that the action was maintainable. *Doe* v. *Hulse*, 5 & 6 *G.* 4. 650

ELEGIT.

Where lands had been taken possession of under an elegit, the Court ordered it to be referred to the master to take an account of the rents and profits received, and if upon inquiry it appeared that the debt had been satisfied, possession to be restored to the defendant. *Price* v. *Varney*, 5 & 6 *G.* 4. 612

ERROR.

See Inferior Court, 2.—Practice, 5.

ESTOPPEL.

A receipt is not an estoppel; it is only primâ facie evidence that the money has been paid, and is open to explanation. Therefore, where in assumpsit by two co-trustees, for money had and received to their use, the defendant produced the receipt of one of them for the money:—Held, that the plaintiffs were not estopped from giving evidence to shew that the money had not been paid, and that the receipt had been obtained by fraud. *Skaife* v. *Jackson*, 5 G. 4. 290

EVIDENCE.

See Apothecaries.—Arbitrator, 2.—Assignment of Debt.—Composition, 1.—Covenant, 2.—Estoppel.—Feoffment.—Fraudulent Representation.—Husband and Wife, 2.—Justices, 1. 2. 5.—Landlord and Tenant, 4.—Mandamus, 5.—Terms for Years, 1.—Tithes.—Usury, 3.—Variance.—Witness.—Writ of Inquiry, 1.

1. In replevin the issue being whether the plaintiff held certain closes, at a fixed rent specified in the avowry:—Held, that *unstamped* receipts tending to shew that the plaintiff had previously paid for the same premises the like rent so specified, were inadmissible to support the issue. *Hawkins* v. *Warre*, 5 & 6 G. 4. 512

2. Where a witness deposed that the settled draft of a lease was the final agreement between the parties, for one of whom he acted as agent:—Held, that an unstamped memorandum, written afterwards by himself but not signed by anybody, was admissible in evidence as a mere proposal, to shew that the settled draft was not the final agreement between the parties. *Id.* 512

3. Where a proposal was made *in writing* by *A.* to let a piece of land to *B.* on certain terms contained in a written agreement between *B.* and *C.*; and *A.* afterwards agreed by *parol* that *B.* should have the land upon the terms proposed:—Held, in an action for a breach of the agreement, that the original proposal was receivable in evidence without a stamp. *Drant* v. *Brown*, 5 & 6 G. 4. 582

EXECUTION.

See Sheriff, 1.

EXECUTORS AND ADMINISTRATORS.

See Annuity.—Covenant, 2.—Pleading, 3.

FACTOR.

Where foreign merchants consigned goods on their own account and risk to a commission agent in this country, for *sale* only, and in the letter of advice wrote, "We expect that you will send us some remittances on account of the proceeds consigned to you, though they be not yet sold, as is customary, in order to encourage us thereby to send you more frequent consignments;" and the agent pledged the goods for advances to himself, he being in embarrassed circumstances:—Held, first, that the consignor might recover the

proceeds from the pawnee, deducting only so much as the agent could have retained; and second, that the shipper's letter to the agent did not amount to an authority to *pledge* the goods. *Queiroz* v. *Trueman*, 5 G. 4. 192

FALSE IMPRISONMENT.

See JUSTICE OF PEACE, 1.

FALSE PRETENCES.

See CERTIORARI, 3.

The offence of obtaining money under false pretences, created by 30 *G*. 2. c. 24., is complete only where the money is obtained. *Pearson* v. *M'Gowran*, 5 & 6 *G*. 4. 616

FALSE RETURN.

See PLEADING, 2.

FEME COVERT.

See HUSBAND AND WIFE.

FEME SOLE.

See HUSBAND AND WIFE.

FEOFFMENT.

Termor assigns his estate to *A*. and *B*. in trust for certain purposes; and by another indenture, executed the next day, he *enfeoffs* *C*. and *D*. of the same lands, upon certain other trusts: —Held, that the term assigned to *A*. and *B*. was not destroyed by the enfeoffment, there being no proof that they had assented to it. *Doe* v. *Lynes*, 5 *G*. 4. 160

FINAL JUDGMENT.

See INDICTMENT, 1.—INFERIOR COURT, 2.

FORFEITURE.

See ANCIENT LIGHTS.—PRACTICE, 8.

FRAUD.

See GUARANTY.

FRAUDS, STATUTE OF.

See ASSIGNMENT OF DEBT.—EVIDENCE.—SUNDAY.

Where goods above the value of 10*l*. lying in the *London* docks, were sold without any written contract, and a delivery order given to the buyer, it was held that the buyer's acceptance of the delivery order was not an actual acceptance of the goods, so as to take the case out of the statute of frauds. *Bentall* v. *Burn*, 5 *G*. 4. 284

FRAUDULENT REPRESENTATION.

See INSURANCE, 1.

If by false and fraudulent representations a party is induced to enter into a written agreement, and is thereby damnified, he may maintain case for the deceit, and give parol evidence of the representations, although they are not noticed in the written contract. *Dobell* v. *Stevens*, 5 & 6 *G*. 4. 490

FREIGHT.

See CHARTER-PARTY.

1. The master of a vessel has no lien upon freight for his wages or other demands, unless it is matter of express stipulation between him and the owner. *Atkinson* v. *Cotesworth*, 5 & 6 *G*. 4. 552

2. Where a master entered into a

contract of affreightment, not under seal, and the shipper agreed to pay the freight at the end of the voyage by a bill at two months, without saying to whom:—Held, that the owner was entitled to receive the freight, without the intervention of the master, and that the freighter was not liable to the captain upon the contract, after he had paid the owner. *Id.* 552

FREIGHTER.

See FREIGHT, 2.

GAME.

See INFORMATION, 1.—MANDAMUS, 5.

GAMING.

See INDICTMENT.

GRANTOR AND GRANTEE.

See LORD OF MANOR.

GROWING CROPS.

Plaintiff, at *Lay-day*, 1821, gave up possession of a farm to defendant, having previously sown 40 acres of it with wheat. At a meeting in the previous month, plaintiff asked defendant if he would take the wheat at 200*l*., saying that if he would not, he should not have the farm. Defendant said he would take the wheat, and being asked to whom the dead stock should be valued, replied, "to me." Defendant afterwards undertook to pay for the wheat and dead stock on a specified day, and did pay 75*l*. on account generally, and eventually had possession of the farm, the wheat, and the dead stock. In indebitatus assumpsit for crops bargained and sold:—Held, first, *per tot. cur.*, that the contract for the dead stock being distinct from the contract for the sale of the wheat, or the giving up of the farm, plaintiff might recover for that amount; second, per *Bayley* and *Holroyd*, J.s., *Littledale*, J. dubitante, that defendant having received the wheat and made a payment on account of it, plaintiff might recover for the rest of that amount; and third, per *Abbott*, C. J., that plaintiff having obtained a general verdict for several items, even if he could not by strict law recover for some of them in this form of action, still as he certainly might in another, the Court would not interfere to reduce the damages. *Mayfield* v. *Wadsley*, 5 G. 4. *Page* 224

GUARANTEE.

See GUARANTY.

GUARANTY.

See PARTNERS.

Where a surety gave a guaranty to *A*. for a certain amount of goods to be sold to *B*., and by a secret agreement between *A*. and *B*. the latter consented to pay 10*s*. per ton beyond the market price of the goods, in satisfaction of an old standing debt due to the former:—Held, that this secret agreement was a fraud upon the guarantee, and discharged his liability. *Pidcock* v. *Bishop*, 5 and 6 G. 4. 505

GUARDIAN.

See Settlement by Apprenticeship, 2.

HABEAS CORPUS.

See Apprentice.

HEIR-AT-LAW.

See Devise, 1.

HIGHWAY.

See Certiorari, 2.

Where a way has been recognized as public in an act of parliament for making streets, squares, &c. it is not necessary that it should be adopted by the parish to make it a public way. *Rex* v. *Lyon*, 5 and 6 *G*. 4. *Page* 497

HUNDRED.

See Sessions, 4.

An action will not lie against the hundred upon the 9 *G*. 1. c. 22. for the unlawful and malicious destruction of a plantation of trees by fire, unless the act done proceeds from a malicious motive towards the owner of the property. Therefore, where a fire, supposed to have been wilfully made, had commenced in another person's plantation, at the distance of a mile from the plaintiff's wood, and by communication the flames destroyed his property:—Held, that the case did not come within the Black Act, so as to entitle him to sue the hundred. *Curtis* v. *Godley Hundred*, 5 *G*. 4. 73

HUSBAND AND WIFE.

1. A woman divorced à mensâ et thoro, and living apart from her husband, upon a separate maintenance, is a feme covert, and cannot be sued as a feme sole. *Lewis* v. *Lee*, 5 *G*. 4. 98

2. Where a tradesman clandestinely supplied a gentleman's wife with jewellery, unnecessary for her station in life, and there was no evidence express or implied that the husband assented to the contract:—Held, that he was not liable. *Montague* v. *Baron*, 5 & 6 *G*. 4. 532

INCLOSURE ACTS.

See Poor's Rate, 5.—Rate, 1.

INDICTMENT.

See Certiorari, 3.—Justices, 5.

Indictment, that defendant in the reign of the *present* King kept a common gaming-house. Plea, that defendant in the reign of the *present* King was acquitted upon an indictment for keeping a common gaming-house in the reign of the *late* King, against the peace of our *said* lord the King; and averring the identity of the offences. Demurrer, concluding with a prayer of judgment of respondeas ouster:—Held, first, that the plea was bad, because the indictment on which the acquittal was founded, charged an offence committed in the reign of the *late* King, and defendant could not by averment shew that the offence charged in both indictments was the same; and, second, that the judgment on demurrer was final, although the demurrer concluded with a prayer of judgment of respondeas ouster. *Sem-*

ble, that every indictment for a misdemeanour must conclude contrà pacem, &c. *Rex* v. *Taylor*, 5 *G*. 4. *Page* 422

INDORSEMENT.

See Bill of Exchange, 1. 3.

INFANT.

See Settlement by Apprenticeship, 1.

An infant can do no act to bind himself, except such as is clearly for his own benefit; therefore, though he may bind himself an apprentice, he cannot dissolve the indenture. *Rex* v. *Great Wigston*, 5 *G*. 4. 339

INFERIOR COURT.

See Certiorari, 1.—Court of Requests, 1.—Mandamus, 2.—Pleading, 5.—Sessions.

1. Where plaintiff sued his steward in an inferior court for 4,000*l*. which was a less sum than he knew to be due to him upon the final investigation of the defendant's accounts, and upon judgment by default verified for 3,400*l*. only:—Held, upon a plea of judgment recovered in answer to a second action in this Court for the balance due, that the plaintiff was concluded by the action brought in the inferior court. *Lord Bagot* v. *Williams*, 5 *G*. 4. 87

2. A custom in an inferior court for the plaintiff, in an action of debt, to issue a summons and attachment on the same day, returnable on the same day, and at the return of those writs, without either of them having been personally served on the defendant, and without the defendant having appeared, to declare, and afterwards sign judgment by default; was held bad in law, and the judgment reversed upon writ of error. *Williams* v. *Lord Bagot*, 5 & 6 *G*. 4. *Page* 219

INFORMATION.

A qui tam information for penalties under the game laws is not an information within the meaning of the 48 *G*. 3. c. 58., so as to entitle the plaintiff to enter an appearance and plea, where the defendant himself neglects to appear and plead. *Davies*, qui tam, v. *Bint*, 5 *G*. 4. 353

INSURANCE.

See Policy of Insurance.

IRREGULARITY.

See Pleading, 6.—Practice.

JETTISON.

See Policy of Insurance, 3.

JOINDER OF COUNTS.

See Assumpsit, 1. — Certiorari, 3.

JOINDER OF PARTIES.

See Partners, 1.—Practice, 5.

JOINT STOCK COMPANIES.

See Bubble Act.

1. Where an association, calling themselves "*The Equitable Loan Bank Company*," issued shares, transferable without restriction, and assumed to act as a corporate body without an act

of parliament or a royal charter:—Held, that they violated the 6 G. 1. c. 18. ss. 18 and 19., and that a broker could not maintain an action against his principal for the price of certain of such shares purchased at the request of the latter.

Semble, that such an association, issuing transferable shares and assuming to act as a body corporate, in anticipation of obtaining an act of parliament to sanction their proceedings, is illegal at common law. *Josephs* v. *Pebrer*, 5 & 6 *G.* 4. *Page* 542

2. If the projectors of a scheme, to be carried on by subscriptions, induce a number of persons to subscribe their money in the purchase of shares, and the scheme is abandoned before it comes into operation:—Held, that the subscribers are entitled to maintain money had and received against the projectors for the whole money subscribed, free from any deduction for expenses incurred in the formation of the plan. *Nockells* v. *Crosby*, 5 & 6 *G.* 4. 751

JURY.

See Bill of Exchange, 2.—Court of Requests, 1.—Pleading, 5.—Terms for Years, 1.—Trover, 2.—Writ of Inquiry, 1.

JUSTICES.

See Ale-houses, 1.—Appeal, 1.—Mandamus, 1, 2. 5.—Order of Removal, 1.

1. Where a magistrate committed a party to prison for an alleged offence against one statute, and afterwards drew up a conviction for a different offence from that stated in the commitment:—Held, that the conviction was no justification of the magistrate in an action against him for false imprisonment:—Held also, that the 43 *G.* 3. c. 141. s. 2., which deprives a plaintiff of his costs of suit against a magistrate, if the latter proves at the trial that the plaintiff was guilty of the offence imputed, only applies to cases where the conviction has been *quashed*, and, therefore, such evidence was inadmissible, it not appearing that the conviction had been quashed. *Sed quære*, whether admissible in mitigation of damages. *Rogers* v. *Jones*, 5 *G.* 4. *Page* 268

2. The stat. 11 *G.* 2. c. 19. s. 16., which gives a summary remedy to landlords whose tenants have deserted their premises with rent in arrear, and no sufficient distress, by *requesting* two justices, on their own view, to deliver possession, does not require the request or complaint to be made *upon oath*. Therefore, where in trespass against two magistrates for turning a tenant out of possession under this act, a record of the proceedings, drawn up conformably to the statute, was given in evidence:—Held, that it was a complete defence to the action, though they did not appear to have acted on the *oath* of the landlord. *Basten* v. *Carew*, 5 & 6 *G.* 4. 558

3. A charter provided, that there should be two aldermen in the borough of *D.* who should act for one year, by themselves, *or their deputies;* that on their

death or removal, other aldermen should be elected, who should act for the rest of the year, by themselves, *or their deputies;* that in the absence of the aldermen, new aldermen might be elected in their room; and, that the aldermen for the time being should be justices of the peace for the borough:—Held, that the deputy of an alderman was not a justice of the peace for the borough. *Jones* v. *Williams*, 5 & 6 *G*. 4. *Page* 654

4. *Semble*, that since the 27 *H*. 8. c. 24. s. 2., the king cannot delegate the power of making a justice of the peace. *Id.* *ib.*

5. The 33 *Geo*. 3. c. 54. s. 15., which authorises justices, on complaint made on oath by any member of a friendly society, "to hear and determine in a summary way the matter of such complaint, and to make such order therein as to them shall seem just," gives them no jurisdiction beyond the actual matter of *the* particular complaint made. Therefore, where a sick member complained that the stewards refused to pay him his arrears of allowance, and the justices ordered that the arrears and costs should be paid, *and that the complainant should be continued a member*:—Held, that the justices had exceeded their jurisdiction in making the latter part of the order, and that the stewards were not bound to obey it. *Rex* v. *Soper*, 5 & 6 *G*. 4. 669

JUSTIFICATION.

See Libel, 1.

LANDLORD AND TENANT.

See Covenant, 3.—Evidence, 1.—Justices, 2.

1. Where sole tenant from year to year, before the termination of his tenancy, entered into an agreement with his landlord for a lease, to be granted to him and another jointly, and both entered upon and occupied the premises jointly:—Held, that the first tenancy was determined, though the lease was never executed pursuant to the agreement. *Hamerton* v. *Stead*, 5 *G*. 4. *Page* 206

2. An occupation of premises, pending the execution of a lease, constitutes the relation of landlord and tenant, and will entitle the latter to sue the former upon a quantum valebat, although no distress for rent can be made. *Id.* *ib.*

3. Where a colliery, with all the machinery and implements necessary for working it, was leased for years, with a proviso for re-entry by the landlord on non-payment of rent, and a covenant on the part of the lessee, at the expiration *or other sooner determination* of the demise, to deliver up the machinery and implements, conformably to an inventory annexed to the lease, of which a re-valuation was to be made three months before the expiration of the demise, and the landlord recovered judgment in ejectment in *Trinity* term, for a forfeiture in not paying rent, but did not execute the writ of possession until the 8th of *November*, and the tenant com-

mitted an act of bankruptcy next day:—Held, first, that the landlord was entitled to take possession of all the machinery and implements (some of which had been brought on the premises by the tenant during the term), though no previous valuation had been made; second, that the possession of the machinery and implements by the tenant was only qualified, and did not come within the meaning of 21 *J.* 1. c. 19., so as to bar the landlord's right of entry on the 8th of *November;* and third, that the tenant's use of the machinery and implements in the interval between the judgment in ejectment and the execution of the writ of possession, did not give him "the possession, order, or disposition" thereof, with the consent of the true owner, within the meaning of the statute, so as to pass the property to his assignees. *Storer* v. *Hunter,* 5 *G.* 4. *Page* 240

4. Where a cottager occupied a piece of land inclosed from the waste on the side of a turnpike road for more than thirty years without paying rent, and at the end of that time paid sixpence rent, on four several occasions, to the owner of the adjoining land:—Held, that this was conclusive evidence of a permissive occupation only, so as to maintain ejectment. *Doe* v. *Wilkinson,* 5 *G.* 4. 273

5. If a tenant underlets part of the premises *by deed,* and the original lessor distrains upon the under-tenant for rent, the latter cannot maintain assumpsit against *his* lessor, to recover the money paid under the distress. *Schlencker* v. *Moxsy,* 5 & 6 *G.* 4. *Page* 747

LEASE.

See Certiorari, 1.—Covenant, 3.—Evidence, 2.—Landlord and Tenant, 1, 2, 3. 5.

LESSOR AND LESSEE.

See Covenant, 3.—Justices, 2.—Landlord and Tenant, 5.

LIBEL.

It is no justification to an action for libel in a newspaper that the matter complained of is a true, fair, just, and correct report and account of proceedings which took place at a public police office, in the course of a preliminary inquiry openly and publicly conducted before a justice, upon a criminal charge against the plaintiff, although published with no scandalous, defamatory, unworthy, or unlawful motive, but merely as public news. It seems, however, that it is lawful to publish in a newspaper the result of what a justice may think fit to do, upon a matter of criminal charge previous to trial, if the publication contains no statement of the evidence, nor any comments upon the case. *Quære,* whether the publication of ex-parte proceedings even in this Court is allowable by law. *Duncan* v. *Thwaites,* 5 *G* 4. 447

LICENSES.

See Ale-houses, 1.—Mandamus, 1.

LIEN.

See Freight, 1.—Usury, 2.

Where the defendant applied to set off the costs and damages recovered in an action brought by him against the costs and damages recovered in an action brought against him:—Held, that the plaintiff's attorney had a lien upon the judgment obtained by his client against the defendant, for the amount of his costs in that cause only. *Stephens* v. *Weston*, 5 G. 4. *Page* 399

LORD OF MANOR.

The lord may grant, by deed, the stewardship of a manor for the life of the grantee. *Bartlett* v. *Downes*, 5 & 6 G. 4. 526

MALICE.

See Hundred, 1.

MANDAMUS.

See Appeal, 1.—Attachment, 1.—Corporation, 1.

1. Mandamus will not lie to the justices to re-hear an application for an ale license at any other period of the year than within the first twenty days of *September*, though the justices may have refused a license under a mistake of the law. *Rex* v. *The Justices of Surrey*, 5 G. 4. 308

2. Service of a rule nisi for a mandamus to the sessions to hear an appeal against the determination of the petty sessions, need not be upon the clerk of the peace; it is sufficient if it be served on the justices whose decision is complained against. *Rex* v. *Tucker*, 5 G. 4. 434

3. Mandamus refused to a corporation to meet for the purpose of considering the propriety of removing non-resident members, where the charter in terms required residence. *Rex* v. *Totness*, 5 & 6 G. 4. *Page* 481

4. Mandamus granted to the steward of a manor to allow inspection of the court rolls to two tenants, litigating a right of common in the manor, although the cause was not at issue. *Rogers* v. *Jones*, 5 & 6 G. 4. 484

5. Mandamus lies to justices to amend the record of a game conviction, by setting out the evidence on which it is founded, as nearly as possible in the words used by the witnesses. *Rex* v. *Warnford*, 5 & 6 G. 4. 489

6. An inhabitant of a borough is not, by force of his inhabitancy, entitled to be a corporator; therefore, where the inhabitant of a borough applied for a mandamus to be enrolled and sworn a corporator, but did not shew an inchoate right in the inhabitants to be corporators, the Court refused the writ. *Rex* v. *West Looe*, 5 & 6 G. 4. 590

7. Mandamus will not lie to churchwardens to *make* a rate. *Rex* v. *Wilson*, 5 & 6 G. 4. 602

MANOR.

See Lord of Manor, 1.—Mandamus, 4.

MISDEMEANOUR.

See Indictment, 1.

MONEY HAD AND RECEIVED.

See Bubble Act.—Joint Stock Companies.

NEGLIGENCE.

See ATTORNEY, 2, 3.

NONSUIT.

See PRACTICE, 7.

NORWICH UNION SOCIETY.

See BANKRUPT, 1.

ORDER OF REMOVAL.

See SETTLEMENT.

A suspended order of removal must be served within a reasonable time. Therefore, where an order of removal was made and suspended on the same day, on account of the age and infirmity of the pauper; and she survived three years, but no notice of the order of removal was served on the parish to which she was ordered to be removed till after her death:—Held, that the service was not within a reasonable time, and that the order of removal was void. *Rex* v. *The Inhabitants of Lampeter*, 5 *G.* 4. *Page* 310

OUTLAWRY.

1. In process of outlawry the third proclamation must be made in the parish in which the defendant is dwelling at the time the writ of proclamation issues; if made otherwise it is a nullity, but the Court will only set aside the outlawry on the terms of the defendant putting in bail to pay the condemnation money, unless it appears that the process of the Court has been abused, or the proclamation has been made in a different parish, in order to prevent the defendant having knowledge of the proceeding. *Rayer* v. *Cooke*, 5 *G.* 4. *Page* 302
2. An attorney making an affidavit in support of an application to reverse an outlawry against a defendant who does not appear personally, must shew, in express terms, that he is duly authorised by the outlaw to make the application. *Plunket* v. *Buchanan*, 5 & 6 *G.* 4. 625

OVERSEERS.

1. Where a declaration in debt for penalties on the 55 *G.* 3. c. 137. s. 6. charged that defendant, being overseer of the parish of C., in his own name, supplied for his own profit certain goods and provisions for the support of the poor of the said parish, "whereby, and by force of the statute in such case made and provided, the said defendant forfeited for his said offence 100*l.*, and thereby, and by force of the statute in such case made and provided, an action hath accrued, &c.:—Held, ill, for not averring in terms that the act done was "against the form of the statute," and after verdict the judgment was arrested. *Wells* v. *Iggulden*, 5 *G.* 4. 13
2. In a declaration on the same statute, it is unnecessary to negative the exceptions in the 6th sect. which imposes the penalty. *Id.* *ib.*
3. A rated inhabitant of a parish cannot sue an overseer for the penalty given by 17 *G.* 2. c. 3. s. 2., for refusing an inspection of the rate books, unless he shews that he has been *injured* by the refusal. *Spenceley* v. *Robinson*, 5 & 6 *G.* 4. 572

The demand of an inspection under this statute must be made at a reasonable time and place; therefore, where the demand was made at a parishioner's own house at eight o'clock in the evening, and not at the house of the overseer:—Held, that the overseer incurred no penalty by refusing. *Spenceley* v. *Robinson*, 5 & 6 *G*. 4. *Page* 572

A parishioner is entitled by the same statute to have, on demand, a copy of the rate *forthwith* delivered to him, upon paying 6*d*. for every twenty-four names:—Held, that the overseer is entitled to a reasonable time to make the copy. *Id*. *ib*.

PARTNERS.

See Arbitrator, 3. Usury, 2.

Where one partner in a banking firm declared upon a guaranty given to him alone for the repayment of a sum of money advanced by A., and it appeared that the money was advanced out of the partnership funds:—Held, that as the interest was joint, the guaranty ought to have been declared upon according to its legal effect, and that the single partner could not sue alone. *Garrett* v. *Handley*, 5 *G*. 4. 319

PATENT.

See Case, 1.

PAYMENT.

See Assignment of Debt.—Bankrupt, 3.——Bill of Exchange, 4.——Composition, 2.—Tender.

PENALTIES.

See Information, 1.—Overseers.

PERSONAL SERVICE.

See Attachment, 1.—Inferior Court, 2.

PETTY SESSIONS.

See Mandamus, 2.—Sessions, 4.

PLEADING.

See Assumpsit, 1.—Bail, 2.—Covenant, 1, 2.—False Pretences, 1.—Husband and Wife.—Indictment, 1.—Inferior Court.—Libel.—Overseers, 1, 2.—Practice, 3, 4, 5, 6.—Puis Darrein Continuance.—Tender.—Usury, 6.—Variance, 1.

1. In proceedings by scire facias against bail, the declaration stated that *S*., the plaintiff in the original action, becam bankrupt, "whereupon a commission of bankrupt was duly awarded against him; and *A*. *B*. and *C*. (plaintiffs in the sci. fa.) were *duly chosen assignees* of the estate and effects of the said *S*. under the commission, and now on behalf of the said *A*. *B*. and *C*., *as assignees as aforesaid*, we have been informed," &c.:—Held, that this was a sufficient averment of the plaintiff's title to sue as assignees, without alleging that an assignment of the bankrupt's effects had been actually made; but upon special demurrer, it seems that it would have been bad for uncertainty. *Fletcher* v. *Pogson*, 5 *G*. 4. *Page* 1

2. In an action against a sheriff for a false return to a *ca. sa.* it is not necessary to aver in the declaration that the sheriff had notice from the plaintiff that the defendant was within his bailiwick, so that he might arrest him. *Dean of Hereford* v. *Macnamara*, 5 *G*. 4. *Page* 95

3. In covenant against executors the defendant pleaded at nisi prius as a plea puis darrein continuance, a judgment recovered upon a bond of the testator after the last continuance, to wit, on the 2d day of *August*, as of the preceding *Trinity* term, and the plaintiff having pleaded over:—Held, that the plea was an answer to the action, although by fiction of law the judgment was obtained before the last continuance. *Lyttleton* v. *Cross*, 5 *G*. 4. 175

4. Where the purposes of justice require that the true time when a judgment is recovered or a writ is tested shall be shewn, it is competent to a party to avail himself of the fact by averment in pleading. *Id.* *ib.*

5. Trespass, for breaking and entering plaintiff's house, and seizing and carrying away his goods. *Plea,* a *justification* under a judgment recovered in a court-baron, and a precept issued thereon. Replication, that there is not any memorandum of the proceedings, or of the said supposed judgment, remaining in the said court-baron, in the said plea mentioned:—Held, *Littledale*, J. dubitante, that the replication tendered an immaterial issue, and was therefore bad on general demurrer. *Dyson* v. *Wood*, 5 *G*. 4. 295

6. Defendant, first, pleads in abatement, and without applying to the Court for leave to withdraw that plea, secondly, pleads a judgment recovered: — Held, that plaintiff was at liberty to sign judgment as for want of a plea. *Palmer* v. *Dixon*, 5 & 6 *G*. 4. *Page* 623

POLICY OF INSURANCE.

1. Where an insurance was effected on the life of *A*. for the benefit of *B*., and the insurance office acted upon *A*.'s own representation as to the state of his health, and it turned out that he was not an insurable life:—Held, that *B*. could not maintain an action on the policy, although he was not privy to the representation. *Maynard* v. *Rhodes*, 5 *G*. 4. 266

2. Policy on goods by ship or ships at and from *Demerara* to *London*, warranted to *sail from Demerara* on or before 1st *August*, 1823. Usage found for small vessels to load and unload all their cargo in the river of *Demerara*, and for large vessels to load and unload part of their cargo on the outside of a shoal off *Demarara*, about ten miles at sea. The goods insured were loaded on board a small vessel which completed her cargo in the river, the captain of which, having obtained his clearance, set sail on 1st *August*, proceeded down the river, and about two miles out to sea, and there anchored, at low water, by the advice of his pilot. On 3d *August* he crossed the shoal and proceeded on his voyage, in the course of which the vessel was lost by perils of

the sea:—Held, that the vessel *sailed from Demerara* on the 1st *August*, within the meaning and in satisfaction of the terms of the policy. *Lang* v. *Anderdon*, 5 *G*. 4. *Page* 393

3. Policy on horses "warranted free from mortality." Special verdict finding, that on the voyage, in consequence of a storm, the horses broke down the partitions between them, and by kicking, bruised each other so much that they died; that a particular usage with respect to policies on live stock prevailed at *Lloyd's* Coffee-house in *London*, and was adopted both by the underwriters subscribing and the merchants effecting policies there; and that this policy was effected there:—Held, first, that this was a loss by perils of the sea, for which plaintiff might recover notwithstanding the warranty; and second, that, as it did not appear that plaintiff knew of the usage prevailing at *Lloyd's*, or was in the habit of effecting policies there, such usage did not bind him. *Gabay* v. *Lloyd*, 5 & 6 *G*. 4. 641

POOR.

See Order of Removal, 1.—Overseers.—Poor's Rate.—Settlement.

POOR'S RATE.

See Overseers, 3.

1. Where by a local act the guardians of the poor of the town of *Kingston-upon-Hull* were authorised to levy rates "by taxation of every inhabitant, and of all lands, houses, tithes impropriate, appropriation of tithes, and all *stocks and estates* in the said town, in equal proportions, according to their respective worths and values:"—Held, that under this act, all personal property, including shipping, was rateable, whether the owners were or were not resident within the town. *Rex* v. *The Hull Dock Company*, 5 *G*. 4. 359

2. If the ground of appeal against a poor's rate be, that certain rateable property has been altogether omitted, the onus does not lie upon the appellant to give the sessions the means of amending the rate, it being the duty of parish officers to include all rateable property in the rate, and take what means they can to ascertain its value. *Id.* *ib.*

3. A landlord cannot be rated to the poor in respect of houses let to tenants who have been excused their rates on the ground of poverty. *Id.* *ib.*

4. A rate upon the *Hull Dock Company* to the full amount of their profits, without regard to the amount of poor's rates with which they are chargeable, is bad. *Id.* *ib.*

5. By a private inclosure act the tithes of a parish were abolished, and in lieu thereof, a yearly money payment, by way of compensation, (to be calculated with reference to the annual value of the tithes and the price of corn for a certain number of byegone years,) directed to be made to the vicar quarterly, "free and clear of all rates, taxes and deductions whatsoever:"—Held, that these latter words exempted the vicar from poor's rates in

respect of the money so directed to be paid to him. *Chatfield* v. *Ruston*, 5 & 6 *G*. 4. *Page* 675

POUNDAGE.

See Sheriff, 1.

PRACTICE.

See Appeal, 1.—Assumpsit, 1. — Attachment. — Attorney. — Bail, 1, 2. — Bankrupt, 2. — Certiorari, 2, 3. — Costs, 1, 2. — Court of Requests, 1.—Covenant, 1, 2.— Elegit. —Indictment. —Inferior Court.—Information.— Mandamus, 2. — Pleading, 2, 3, 4. 6.—Puis Darrein Continuance. — Sessions. — Venue. — Writ of Inquiry, 1.

1. Where a latitat issued in 1823, returnable in *Trinity* term, against three defendants, one of whom was served with process before the return thereof, but the others were not brought into Court until *Easter* 1824, of which term an appearance was entered for all the defendants; and the plaintiff having neglected to declare before the end of the term next following:— Held, that the defendants might sign judgment of non. pros. under 13 *Car*. 2. st. 2. c. 2. s. 3. *Inwood* v. *Mawley*, 5 *G*. 4. 350
2. Defendant having eight days to appear to non-bailable process, his attorney indorsed the writ with an undertaking to appear, but before the time for appearance had expired, plaintiff's attorney demanded a plea, and no appearance being afterwards entered, signed judgment, which was held irregular, and set aside, but without costs. *Martin* v. *Mahony*, 5 & 6 *G*. 4. *Page* 609
3. The want of a ca. sa. against the principal cannot be taken advantage of by the bail as an irregularity, but must be pleaded to the sci. fa. *Philpot* v. *Manuel*, 5 & 6 *G*. 4. 615
4. A defendant, under terms of pleading *issuably*, cannot *demur specially*; if he does, the plaintiff may sign judgment as for want of a plea. *Sawtell* v. *Gillard*, 5 & 6 *G*. 4. 620
5. Two defendants were held to bail for an assault and battery, and the plaintiff declared against one only:—Held, that he might do so. *Wilson* v. *Edwards*, 5 & 6 *G*. 4. 622
6. If defendant, as matter of indulgence, obtains time to plead, on the condition of giving plaintiff judgment as of the term in which the time is obtained, he must give an *available* judgment, and cannot afterwards bring a writ of error. *Cave* v. *Massey*, 5 & 6 *G*. 4. 624
7. It is no ground of nonsuit, in an action of ejectment, that the service of the declaration is on a day subsequent to that of the demise to *John Doe*, if it appears that there is rent in arrear, and no distress on the premises at the time the declaration is served. *Doe* v. *Shawcross*, 5 & 6 *G*. 4. 711
8. The statute 4 *G*. 2. c. 28. s. 8. substitutes the service of a declaration in ejectment in lieu of a formal demand of rent, to work a forfeiture. *Id.* *ib.*

PREROGATIVE.

See Justices, 4.

PRINCIPAL AND AGENT.

See Assignment of Debt.—Bill of Exchange, 1.—Carrier.—Composition, 2.—Evidence, 2.—Factor.—Joint Stock Companies, 1.

PROCESS.

See Inferior Court, 2.—Practice, 1, 2.

PROMISSORY NOTE.

See Assignment of Debt.—Trover, 2.

1. *A.* being indebted to *C.*, *A.* and *B.* gave their joint and several promissory note for the amount to *C.* *A.* becoming further indebted and pressed for further security, by a bill of sale, (reciting that *C.* having demanded payment of the debt, *A.* had requested him to accept a *further* security,) assigned his household effects to *C.* as a *further* security, with a proviso that he should not be turned out of possession of the effects till after three days' notice :—Held, that *C.'s* remedy on the note was neither suspended nor extinguished, by the bill of sale, but that he might sue *A.* on the note at any time, notwithstanding the bill of sale. *Twopeny* v. *Young*, 5 *G.* 4. *Page* 259

PROSECUTOR.

See Costs, 2.

PUIS DARREIN CONTINUANCE.

If a continuance be entered from the last day of *Trinity* to the first day of *Michaelmas* term, facts occurring in the interim cannot be pleaded puis darrein continuance after the first day of *Michaelmas* term, without the leave of the Court. *Rex* v. *Taylor*, 5 & 6 *G.* 4. *Page* 521

RATE.

See Mandamus, 7.—Overseers, 3.—Poor's Rate, 1.

By the general inclosure act, 41 *G.* 3. c. 109. s. 10., commissioners are empowered to set out private roads, which, when set out, are to be *made* and kept afterwards in repair *at the expense of the owners and proprietors* of the lands inclosed:—Held, that commissioners who had *made* private roads under the authority of that and a private inclosure act, (which said nothing about *private* roads,) had no power to make a rate for reimbursing themselves the expense incurred. *Earl Falmouth* v. *Richardson*, 5 & 6 *G.* 4. 664

RECEIPT.

See Estoppel.—Evidence, 1.

RECORD.

See Justices, 2.—Mandamus, 5.

RECOVERY.

See Devise, 2.

RENT.

See Devise, 4.—Elegit.—Evidence, 1.—Justices, 2.—Landlord and Tenant, 4, 5.—Practice, 7, 8.

REPLEVIN.

See Evidence, 1.

RESPONDEAS OUSTER.

See INDICTMENT.

RETURN.

See ATTACHMENT.

REVOCABLE AUTHORITY.

See ASSIGNMENT OF DEBT.

RIGHT OF WAY.

A right of way for all the king's subjects to pass and repass with their carts and *carriages*, is not restrained because *all* carriages cannot pass and repass. *Rex* v. *Lyon*, 5 & 6 *G*. 4. *Page* 497

ROADS.

See RATE, 1.

RULE OF COURT.

See ATTORNEY, 2.

SALE.

See EVIDENCE, 3.—GROWING CROPS.—SHIP.

SCIRE FACIAS.

See PLEADING, 1.—PRACTICE, 3.

SERVICE OF DECLARATION.

See PRACTICE, 7, 8.

SESSIONS.

See APPEAL, 1.—CERTIORARI, 2.—MANDAMUS, 2.—ORDER OF REMOVAL.

1. The sessions have no jurisdiction to receive an appeal in a matter of bastardy until the requisites of 49 *G*. 3. c. 68. ss. 5 and 7. have been complied with, as to the notice of appeal, and entering into a recognizance. *Rex* v. *The Justices of Lincolnshire*, 5 *G*. 4. *Page* 347
2. Notice of appeal for an adjourned session for a different division of a county, does not satisfy the requisites of the statute 49 *G*. 3. c. 68. *Id.* *ib.*
3. A rule of practice at sessions will not control the express words of an act of parliament. *Id.* *ib.*
4. The 3 *G*. 4. c. 33. s. 2. gives a summary remedy, to the extent of 30*l*., against the hundred, for injuries done to property by riotous assemblies, on application to the petty sessions in the manner therein described; and by s. 7. an appeal lies to the quarter sessions where persons are aggrieved by any thing done in pursuance of the act. Where the petty sessions, under a mistake of the law, and not upon the merits of the case, dismissed an application under this statute:—Held, that the quarter sessions might entertain an appeal against their determination. *Rex* v. *Tucker*, 5 *G*. 4. 434

SET-OFF.

See LIEN.

SETTLEMENT, *by Apprenticeship*.

1. Where an infant bound himself apprentice for seven years, and after serving three years, quarrelled with his master, paid him sixpence for the remainder of his time, and then left him, and bound himself to another master in another parish:—Held, that the apprentice had no power to dissolve the first apprenticeship,

and that the second, therefore, was invalid, and conferred no settlement. *Rex* v. *Great Wigston*, 5 *G*. 4. *Page* 339

2. Where a parish is incorporated with others for the maintenance of its poor, and a guardian is appointed under the 22 *G*. 3. c. 83., the churchwardens and overseers may still bind out poor children apprentices, and the indentures need not be signed by the guardian. *Rex* v. *Lutterworth*, 5 *G*. 4. 343

SETTLEMENT, *by Hiring and Service.*

1. Where a pauper, ten years old, went to service "for meat and clothes, *as long as he had a mind to stop*, to do what he could, and what he was bid," and remained two years:—Held, that this was not a yearly hiring, and that a settlement was not acquired by service under it. *Rex* v. *Christ's, York*, 5 *G*. 4. 314

SHERIFF.

See PLEADING, 2.

Where the sheriff retained out of the proceeds of a sale, under an execution, the expenses occasioned by keeping possession of the goods under an injunction out of *Chancery*:—Held, that this was an indirect taking of more than the poundage allowed by 29 *Eliz*. c. 4., and that he thereby incurred the penalties of that statute. *Buckle* v. *Bewes*, 5 & 6 *G*. 4. 495

SHIP.

See APPRENTICE. — CHARTER-PARTY. — FREIGHT. — POOR'S RATE, 1.

Where the master of a ship, on a voyage from *Calcutta* to *London*, laden with indigo, was obliged to put into *Mauritius* from unseaworthiness, and there abandoned ship and cargo, which were bonâ fide sold by public auction, under the orders of the Vice Admiralty Court:—Held, in assumpsit by the owner against the purchaser of the indigo; first, that there being no pressing necessity for the sale, the master could confer no title upon the vendee; second, that a judgment in tort against the owner of the vessel for not delivering the cargo, pursuant to the bill of lading, was no bar to this action; and third, that an unavailing demand of the proceeds in the Vice Admiralty, did not prevent the plaintiff from recovering the full value of the indigo from the defendant. *Morris* v. *Robinson*, 5 *G*. 4. *Page* 34

SHIP OWNER.

See CHARTER-PARTY. —— FREIGHT. — POOR'S RATE, 1. — SHIP.

SLANDER.

The words, "I think the present business ought to have the most rigid inquiry, for he (the plaintiff) murdered his first wife; that is, he administered, improperly, medicines to her for a certain complaint, which was the cause of her death," are actionable, and if doubtful, the doubt is cured by verdict. *Ford* v. *Primrose*, 5 *G*. 4. 287

SPECIAL ASSUMPSIT.

See ASSUMPSIT, 1.

SPECIAL DEMURRER.

See PLEADING, 1, 2.—PRACTICE, 4.

STAMP.

See EVIDENCE, 1, 2, 3.

STATUTES CITED OR COMMENTED UPON.

Henry 7.

9. c. 20. Usury. *Page* 114
10. c. 14. Usury. 114

Henry 8.

6. c. 4. Outlawry. 304
27. c. 24. s. 4. Forfeiture. 426
— c. — s. 2. Justice of the Peace. 654
34 & 35. c. 26. Welch Judges. 661

Edward 1.

13. Hundred. 22

Richard 2.

13. c. 13. Informations. 355

Elizabeth.

27. c. 8. *Sheriff.* 97
27. c. 13. Hundred. 22
29. c. 4. Sheriff's Poundage. 495
31. c. 3. Outlawry. 303
— c. 5. s. 2. Usury. 616
43. c. 2. Poor's Rate. 362. 675
49. c. 2. Parish Apprentices. 346

Charles 2.

13. st. 2. c. 2. s. 3. Process. 350
15. c. 2. Trees. 268
29. c. 3. Contracts. 284
— c. 3. s. 17. Contracts. 84
— c. 7. s. 2. Sunday. 82

James 1.

1. c. 11. Marriages. *Page* 102
— c. 15. s. 14. Bankrupts. 279
21. c. 4. Usury. 616
— c. 19. Bankrupts. 240
— c. — s. 16. Bankrupts 282

William and Mary.

3. c. 11. s. 9. Appeals. 312

William 3.

9 & 10. Kingston upon Hull Rates. 359

Anne.

5. c. 14. Game. 16. 353
9. c. 25. Game. 16
12. s. 2. c. 6. Usury. 110. 616

George 1.

1. c. 2. Hundred. 75
6. c. 16. Trees. 75
— c. 18. ss. 18, 19. Bubble Act. 542. 751
8. c. 14. Game. 356
8. c. 19. Game. 16
9. c. 22. Hundred. 73
22. c. 36. Hundred. 75
29. c. 36. Hundred. 78

George 2.

4. c. 28. Ejectment. 711
5. c. 30. s. 23. Bankrupt. 30
5. c. 30. s. 26. Bankrupt. 2
11. c. 19. s. 16. Landlord and Tenant. 558
17. c. 3. s. 2. Inspection of Rates. 572
29. c. 31. ss. 4. 16. Alehouses. 308
30. c. 24. s. 20. Certiorari. 611
— c. — False Pretences. 616

George 3.

2. c. 19. Game. 16
6. c. 36. Hundred. 80

(*Geo.* 3. *continued.*)
6. c. 48. Trees. *Page* 80. 268
13. c. 51. s. 3. Welch Judges. 661
13. c. 78. s. 80. Highways. 538
17. c. 15. Court-Baron. 293
20. c. 36. Poor. 344
22. c. 83. Poor. 345
26. c. 96. Informations. 356
31. c. 25. s. 16. Stamps. 519
33. c. 54. Benefit Societies. 669
35. c. 3. Benefit Societies. 669
39 & 40. c. 104. Court of Requests. 371. 628
41. c. 23. Rates. 369
— c. 109. Inclosure Act. 664
43. c. 46. s. 3. Costs. 383
— c. 141. s. 2. Costs. 268
44. c. 98. s. 14. Conveyances. 648
48. c. 58. Informations. 353
49. c. 68. ss. 5. 8. Appeals. 347
49. c. 124. s. 2. Poor. 312
51. c. 100. Inclosure. 664
53. c. 216. Norwich Union Society. 25
55. c. 137. s. 6. Overseers. 13
— c. 184. Stamps. 519
— c. 194. Apothecaries. 62

George 4.
1. c. 56. Malicious Trespass. 588
3. c. 23. Convictions. 489
— c. 33. s. 2. Hundred. 434
— c. 77. s. 7. Alehouses. 308
— c. 102. Court of *K. B.* 187

SUNDAY.

Where a parol contract was entered into for the purchase of a horse above the value of 10*l.* on a *Sunday,* with a warranty of soundness, and the horse was not delivered and paid for until the following *Tuesday*:—Held, first, that the contract was not complete until the latter day, and second, that supposing it to be void within the 29 *Car.* 2. c. 7. s. 2., still it was not an available objection on the part of the vendor, in an action for a breach of the warranty, the vendee being ignorant of the fact that the former was exercising his ordinary calling on the Sabbath-day. *Bloxsome* v. *Williams,* 5 *G.* 4. *Page* 82

SUPERSEDEAS.

See Attorney, 2.

SURETY.

See Guaranty, 1.

SURRENDER.

See Attorney, 2.—Terms for Years, 1.

SURVEYOR.

See Certiorari, 2.

TENDER.

A tender of 2*l.*, to pay 1*l.* 13*s.*, is good, if the plaintiff objects to receive it only because he is entitled to a larger sum, and not on the ground that he has no change. *Cudman* v. *Lubbock,* 5 *G.* 4. 289

TERMS FOR YEARS.

See Feoffment, 1.

Where an alleged outstanding term appears to have done the duty for which it was created, the jury are at liberty to presume a surrender of it. *Bartlett* v. *Downes,* 5 & 6 *G.* 4. 526

TITHES.

See Poor's Rate, 5.

Declaration in case for not carry-

ing away the tithe of corn, alleging it to have been "lawfully and in due manner" set out, is sustained by proof that the tithe was set out according to an agreement between the parties, though not according to the mode prescribed by common law. Whether the crop has been left on the ground a reasonable time after the tithe has been set out, for the tithe-owner to compare his tenth part with the residue, is a question of fact for the jury, and not of law for the judge. *Facey* v. *Hurdon*, 5 *G.* 4. *Page* 68

TRESPASS.

See APPEAL, 1.—JUSTICES, 1. 3. —PLEADING, 5.—RATE, 1.

TROVER.

See BANKRUPT, 3.—LANDLORD AND TENANT, 3.

1. *A.*, having contracted to purchase an estate of *B.*, procured the deeds of conveyance to be prepared at his own expense, and sent them to the latter for execution. When executed they were delivered to a servant to be returned, but the servant delivered them to *C.*, an attorney, to whom *B.* was indebted for business done. In consequence of the refusal of other necessary parties to join in the conveyance, *A.* threw up the contract and demanded the deeds of *C.*, who refused to deliver them up until his demand against *B.* was satisfied:—Held, that trover would lie by *A.* against *C.* for the deeds in a cancelled, if not in an uncancelled state; *Littledale*, J. dubitante. *Esdaile* v. *Oxenham*, 5 *G.* 4. *Page* 49

2. A Bank of *England* note for 1,000*l.*, dated 12th *October*, 1820, was lost in *London*, in *April*, 1821, and in *June*, 1822, was presented for change to a money broker in *Liverpool*, by a person with whom the latter was well acquainted, but who was then in pecuniary difficulties, and he changed it by giving bills, which had some time to run, and cash, deducting a commission, without asking any questions how the holder became possessed of it:—Held, in an action of trover by the true owner against the money broker, that it was for the jury to say whether the defendant had received the note fairly and bonâ fide in the ordinary course of business, and had given full value for it; and the jury having found for the plaintiff, the Court refused to disturb the verdict. *Egan* v. *Threlfall*. 3 *G.* 4. MS. 326

TRUSTEES.

See DEVISE, 4.

USAGE.

See INFERIOR COURT, 2.—POLICY OF INSURANCE, 3.

USURY.

1. A. lent 400*l.* stock to *B.*, taking as security an agreement from *B.* to replace the stock on request, and a bond for the payment of the produce of the stock, and reserving to himself the dividends of the stock for interest, and the option either

to have the stock replaced, or the produce of it paid in money, with interest at 5*l.* per cent.:—Held, an usurious bargain, and void by 12 *Anne,* s. 2. c. 16. *White* v. *Wright,* 5 *G.* 4. *Page* 110

A., B., and *C.*, being in partnership as bankers, *A.* advanced money to the bank by sales of stock, and took bonds for 18,000*l.* from *B.* and *C.* separately, conditioned for replacing 9,000*l.* stock each. The stock was not replaced, and *A.* brought actions on the bonds, and recovered judgments. *A.* withdrew from the bank, being then a creditor for 20,000*l.* stock, which *B.* and *C.*, by the deed of dissolution, agreed to replace by four instalments, covenanting that if they made default therein, *A.* might proceed on the judgments, and that he should have a lien upon certain securities, both for that debt and as an indemnity against the partnership debts, which they agreed to pay. *B.* and *C.* replaced the first instalment when due, but made default in the second. A written agreement, not under seal, was then made, that the debt should be treated as a loan of money from the first, and that the proceeds of the 15,000*l.* stock then due, being 10,083*l.*, should be the debt, and should be repaid at a subsequent time, with legal interest. When that agreement was made, the 15,000*l.* stock was worth only 8,437*l.* Before any part of the 10,083*l.* was paid, *B.* and *C.* became bankrupts, and at the date of the commission, two out of the three remaining days, named in the deed of dissolution for replacing the stock, were past. After *A.* left the bank, he paid some of the old partnership debts. While he remained in the bank, he received the full interest upon his advances, without deducting the property-tax:—Held, first, that the second agreement was usurious and void, but that the deed of dissolution was valid and binding; that *A.* might prove under the commission against *B.* and *C.* for the 15,000*l.* stock, the value of the two instalments, due before the bankruptcy, to be estimated by the price of stocks on the days when they became due, and the value of the third by the price of stocks on the day of the date of the commission, with a rebate for the interval between that day and the day when that instalment would have become due. Second, that *A.* had still a lien upon the securities mentioned in the deed of dissolution. Third, that *A.* might prove for such of the old partnership debts as he had paid. And fourth, that the property tax allowed to *A.* could not be deducted from the sum to be proved by him, it not appearing that *B.* and *C.* had accounted to Government for it. *Parker* v. *Ramsbottom,* 5 *G.* 4. 138

3. *A.* in *London,* consigned goods to *B.* in *Gibraltar,* for sale on commission. *B.*, upon delivery of the invoice and bill of lading to his *London* agent, advanced through him, to *A.*, two-thirds of the invoice price of the goods by bills at ninety days' date, upon which he received 6*l.* per cent. interest from the date of

the bills, that being the usual interest at *Gibraltar*. In assumpsit for the proceeds of the goods:—Held, that the advance was not a loan of money in *England*, and therefore not usurious, and might be proved as a set-off. Held, also, that in an action for money had and received, the plaintiff must prove to what specific sum he is entitled. *Harvey* v. *Archbold*, 5 & 6 *G*. 4. *Page* 500

The offence of usury is complete only in the place where the money is received. *Pearson* v. *M'Gowran*, 5 & 6 *G*. 4. 6

VARIANCE.

The declaration alleged that defendants sold goods as and for goods manufactured by plaintiff; the evidence was, that the persons to whom defendants sold them knew that they were not manufactured by plaintiff, but that defendants copied plaintiff's mark, and sold the goods so marked, in order that the purchasers might re-sell them as and for goods manufactured by plaintiff, and which they did:—Held, not a fatal variance. *Sykes* v. *Sykes*, 5 *G*. 4. 292

VENDOR AND VENDEE.

See Bankrupt, 3.—Frauds, Statute of, 1.—Ship.—Sunday.

VENUE.

See False Pretences.—Outlawry, 1.—Usury, 6.

The Court will not change the venue in an action on a specialty before issue joined. *Weatherby* v. *Goring*, 5 *G*. 4. 441

VERDICT.

See Bill of Exchange, 2.—Slander.—Trover, 2.

VICE ADMIRALTY COURT.

See Ship.

WARRANT.

See Apprentice, 1.

WARRANTY.

See Assumpsit, 1.—Bills of Exchange, 1.—Policy of Insurance, 2, 3.—Sunday.

WAY.

See Highway.—Right of Way.

WILL.

See Devise.

WITNESS.

See Arbitrator, 2.—Mandamus, 5.

1. Where the first witness called for a defendant disproved the fact relied on in defence:—Held, that the defendant was not thereby concluded, but might prove the fact by other witnesses. *Ewer* v. *Ambrose*, 5 & 6 *G*. 4. 629

2. *Quære*, whether the witness's own answer to a bill in chancery was admissible on the part of the defendant, to contradict his own witness. *Id.* ib.